No. 14-940

Title:	Sue Evenwel, et al., Appellants
	v.
	Greg Abbott, Governor of Texas, et al.
Docketed:	February 4, 2015
Lower Ct:	United States District Court for the Western District of Texas
Case Nos.:	(1:14-cv-335)
Decision Date:	November 5, 2014

Questions Presented

—Date—	——Proceedings and Orders----------
Feb 2 2015	Statement as to jurisdiction filed. (Response due March 6, 2015)
Feb 2 2015	Supplemental Appendix of Sue Evenwel, et al., Appellants filed.
Feb 17 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for Sue Evenwel, and Edward Pfenninger.
Feb 20 2015	Order extending time to file response to jurisdictional statement to and including April 6, 2015.
Feb 27 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for respondents
Mar 2 2015	Brief amicus curiae of American Civil Rights Union filed.
Mar 5 2015	Brief amici curiae of Cato Institute, et al. filed.
Mar 6 2015	Brief amici curiae of Tennessee State Legislators and The Judicial Education Project filed.
Mar 6 2015	Brief amicus curiae of Mountain States Legal Foundation filed.
Mar 6 2015	Brief amicus curiae of Southeastern Legal Foundation filed.
Mar 6 2015	Brief amici curiae of Judicial Watch, Inc., et al. filed.
Apr 6 2015	Motion to dismiss or affirm filed by appellees Greg Abbott, Governor of Texas, et al.
Apr 20 2015	Reply of appellants Sue Evenwel, et al., Appellants filed. (Distributed)
Apr 21 2015	DISTRIBUTED for Conference of May 14, 2015.
May 18 2015	DISTRIBUTED for Conference of May 21, 2015.
May 26 2015	PROBABLE JURISDICTION NOTED.
Jun 5 2015	The time to file the joint appendix and appellants' brief on the merits is extended to and including July 31, 2015.
Jun 5 2015	The time to file appellees' brief on the merits is extended to and including September 18, 2015.
Jun 9 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the appellees.
Jun 10 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from appellants Sue Evenwel and Edward Pfenninger.
Jun 29 2015	Motion to dispense with printing the joint appendix filed by appellants Sue Evenwel, et

	al.
Jul 31 2015	Brief of appellants Sue Evenwel, et al. filed.
Aug 5 2015	Brief amicus curiae of American Civil Rights Union filed.
Aug 7 2015	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund, Inc. filed.
Aug 7 2015	Brief amicus curiae of Project 21 filed.
Aug 7 2015	Brief amicus curiae of Tennessee State Legislators and The Judicial Education Project filed.
Aug 7 2015	Brief amici curiae of Cato Institute and Reason Foundation filed.
Aug 7 2015	Brief amicus curiae of Mountain States Legal Foundation filed.
Aug 7 2015	Brief amici curiae of Demographers Peter A. Morrison, et al. filed.
Aug 7 2015	Brief amicus curiae of Center for Constitutional Jurisprudence filed.
Aug 7 2015	Brief amicus curiae of Immigration Reform Law Institute filed.
Aug 7 2015	Brief amici curiae of Judicial Watch, Inc., et al. filed.
Aug 7 2015	Brief amicus curiae of Yakima, Washington filed.
Sep 14 2015	Motion to dispense with printing the joint appendix filed by petitioners GRANTED.
Sep 18 2015	Brief of appellees Greg Abbott, Governor of Texas, et al. filed.
Sep 24 2015	Brief amici curiae of American Civil Liberties Union and the ACLU of Texas filed.
Sep 24 2015	Brief amicus curiae of Common Cause filed.
Sep 24 2015	Brief amici curiae of Texas Senate Hispanic Caucus, et al. filed.
Sep 25 2015	Brief amicus curiae of the United States filed.
Sep 25 2015	Brief amicus curiae of Democratic National Committee filed.
Sep 25 2015	Brief amici curiae of Former Directors of the U.S. Census Bureau filed.
Sep 25 2015	Brief amicus curiae of The Brennan Center for Justice at N.Y.U. School of Law filed.
Sep 25 2015	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed.
Sep 25 2015	Brief amicus curiae of Constitutional Accountability Center filed.
Sep 25 2015	Brief amici curiae of Texas Senators filed.
Sep 25 2015	Brief amicus curiae of Carl E. Heastie in His Official Capacity as Speaker of the New York State Assembly filed.
Sep 25 2015	Brief amici curiae of Direct Action for Rights and Equality (DARE), et al. filed.
Sep 25 2015	Brief amicus curiae of The City of New York filed.
Sep 25 2015	Brief amici curiae of Hispanic National Bar Association, et al. filed.
Sep 25 2015	Brief amici curiae of Children's Defense Fund, et al. filed.
Sep 25 2015	Brief amici curiae of Hawaii Reapportionment Case Plaintiffs (David P. Brostrom, Andrew Walden) filed.
Sep 25 2015	Brief amici curiae of New York, et al. filed.
Sep 25 2015	Brief amici curiae of City of Los Angeles, et al. filed.
Sep 25 2015	Brief amicus curiae of Harris County, Texas filed.
Sep 25 2015	Brief amici curiae of Nathaniel Persily, et al. filed.
Sep 25 2015	Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
Sep 25 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sep 25 2015	Brief amici curiae of Leadership Conference on Civil and Human Rights, et al. filed.
Oct 9 2015	SET FOR ARGUMENT on Tuesday, December 8, 2015
Oct 19 2015	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Oct 19 2015	Reply of appellants Sue Evenwel, et al. filed.
Oct 19 2015	Record requested from the U.S.D.C. Western District of Texas.

Oct 23 2015	Record received from the U.S.D.C. Western District of Texas is electronic.
Oct 27 2015	CIRCULATED
Dec 8 2015	Argued. For appellants: William S. Consovoy, Arlington, Va. For appellees: Scott A. Keller, Solicitor General, Austin, Tex.; and Ian H. Gershengorn, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Apr 4 2016	Adjudged to be AFFIRMED. Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Breyer, Sotomayor, and Kagan, JJ., joined. Thomas, J., filed an opinion concurring in the judgment. Alito, J., filed an opinion concurring in the judgment, in which Thomas, J., joined except as to Part III-B.
May 6 2016	JUDGMENT ISSUED

No. 14-

14-940

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FEB 2 - 2015
OFFICE OF THE CLERK

SUE EVENWEL, EDWARD PFENNINGER,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

BRENDAN J. MORRISSEY
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006

MEREDITH B. PARENTI
PARENTI LAW PLLC
7500 San Felipe
Suite 600
Houston, TX 77063

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PLLC
3033 Wilson Blvd, Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Counsel for Appellants

February 2, 2015

257691

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that the Equal Protection Clause of the Fourteenth Amendment includes a "one-person, one-vote" principle. This principle requires that, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970). In 2013, the Texas Legislature enacted a State Senate map creating districts that, while roughly equal in terms of total population, grossly malapportioned voters. Appellants, who live in Senate districts significantly overpopulated with voters, brought a one-person, one-vote challenge, which the three-judge district court below dismissed for failure to state a claim. The district court held that Appellants' constitutional challenge is a judicially unreviewable political question.

The question presented is whether the "one-person, one-vote" principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

PARTIES TO THE PROCEEDING

Appellants are Sue Evenwel and Edward Pfenninger.

Appellees are Greg Abbott, in his official capacity as Governor of Texas, and Nandita Berry, in her official capacity as Texas Secretary of State.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF APPENDICES v

TABLE OF CITED AUTHORITIES vii

JURISDICTIONAL STATEMENT 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

INTRODUCTION 2

STATEMENT 4

I. The One-Person, One-Vote Principle 4

II. The Texas Senate Redistricting 5

III. This Litigation 8

THE QUESTION PRESENTED IS SUBSTANTIAL 12

Table of Contents

Page

I. This Appeal Presents A Substantial Question.....12

II. The District Court Incorrectly Decided This Important And Yet Unsettled One-Person, One-Vote Question.....16

A. The Court's One-Person, One-Vote Decisions Make Clear That Voters Have A Right To An Equal Vote. 17

B. The District Court's Ruling Fails To Protect The Right Of Voters To An Equal Vote 19

III. The Judgment Below Is Unsustainable If The One-Person, One-Vote Principle Is Meant To Ensure Voter Equality 25

CONCLUSION 30

TABLE OF APPENDICES

Page

APPENDIX A — PLAINTIFFS' NOTICE OF APPEAL IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED DECEMBER 4, 2014 ..... 1a

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, FILED NOVEMBER 5, 2014 ..... 3a

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED NOVEMBER 5, 2014 ..... 15a

APPENDIX D — COMPLAINT, FILED APRIL 21, 2014 ..... 17a

Table of Appendices

Page

SUPPLEMENTAL APPENDIX

EXHIBIT A TO COMPLAINT, FILED APRIL 21, 2014, DECLARATION OF PETER A. MORRISON, PH.D. SA-1

EXHIBIT B TO COMPLAINT, FILED APRIL 21, 2014, CVAP FROM THE 2005-2009 ACS UNDER PLAN S172 ..... SA-4

EXHIBIT C TO COMPLAINT, FILED APRIL 21, 2014, CVAP FROM THE 2006-2010 ACS UNDER PLAN S172 ..... SA-6

EXHIBIT D TO COMPLAINT, FILED APRIL 21, 2014, CVAP FROM THE 2007-2011 ACS UNDER PLAN S172 ..... SA-8

EXHIBIT E TO COMPLAINT, FILED APRIL 21, 2014, POPULATION AND VOTER DATA WITH VOTER REGISTRATION COMPARISON UNDER PLAN S172 ..... SA-10

TABLE OF CITED AUTHORITIES

Page

Cases

Abate v. Mundt,
403 U.S. 182 (1971) 27

Avery v. Midland County,
390 U.S. 474 (1968) 4, 21

Baker v. Carr,
369 U.S. 186 (1962) 20, 21

Bd. of Estimate of City of New York v. Morris,
489 U.S. 688 (1989) 19, 21, 27

Branch v. Smith,
538 U.S. 254 (2003) 22

Brown v. Thomson,
462 U.S. 835 (1983) ..... *passim*

Burns v. Richardson,
384 U.S. 73 (1966) ..... *passim*

Chapman v. Meier,
420 U.S. 1 (1975) 21

Chen v. City of Houston,
121 S. Ct. 2020 (2001) 13, 16, 22, 23

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2000) ..... *passim*

Cited Authorities

Page

Connor v. Finch,
431 U.S. 407 (1977).....7, 18, 21

Daly v. Hunt,
93 F.3d 1212 (4th Cir. 1996)..... *passim*

Davis v. Perry,
991 F. Supp. 2d 809 (W.D. Tex. 2014).....6

Dunn v. Blumstein,
405 U.S. 330 (1972).....17, 21

Gaffney v. Cummings,
412 U.S. 735 (1973).....19

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1991)..... *passim*

Gray v. Sanders,
372 U.S. 368 (1963).....17, 21

Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.,
397 U.S. 50 (1970)..... *passim*

Hicks v. Miranda,
422 U.S. 332 (1975).....13

Kramer v. Union Free Sch. Dist. No. 15,
395 U.S. 621 (1969).....22

Page

Mahan v. Howell,
410 U.S. 315 (1973) 5, 21, 26, 27

Neitzke v. Williams,
490 U.S. 319 (1989) 12

Reynolds v. Sims,
377 U.S. 533 (1964) ..... *passim*

Swann v. Adams,
385 U.S. 440 (1967) 28

Wesberry v. Sanders,
376 U.S. 1 (1964) 17

White v. Regester,
412 U.S. 755 (1973) 5, 7, 21

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 17

Statutes and Other Authorities

U.S. Const. amend. XIV, § 1 ..... 2, 4

28 U.S.C. § 2284 11

42 U.S.C. § 1983 ..... 2, 11

Cited Authorities

Page

E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* (10th ed. 2013) 13

Tex. Const. art. III, § 25 5

Tex. Const. art. III, § 28 5

JURISDICTIONAL STATEMENT

Appellants Sue Evenwel and Edward Pfenninger respectfully submit this jurisdictional statement regarding their appeal of a decision of the United States District Court for the Western District of Texas sitting as a district court of three judges. Appellants ask that the Court note probable jurisdiction and set the case for oral argument.

OPINION BELOW

The district court's decision dismissing the complaint, although not yet reported in the Federal Supplement, is reprinted in the Appendix ("App.") at App. 3a-14a.

JURISDICTION

This case was properly before a three-judge district court pursuant to 28 U.S.C. § 2284(a) because it involves a constitutional challenge to a statewide redistricting plan. The United States District Court for the Western District of Texas entered final judgment against Appellants on November 5, 2014, thereby denying their request for a permanent injunction. App. 15a-16a. Appellants filed their timely notice of appeal on December 4, 2014. App. 1a. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

INTRODUCTION

This is a direct appeal from a three-judge district court decision dismissing Appellants' constitutional challenge to a Texas Senate apportionment plan. The plan in question created districts with roughly equal total population (*i.e.*, all persons counted in the decennial Census) but with gross disparities in voters or potential voters. Appellants, both of whom reside in districts significantly overpopulated with such voters as compared to other districts in the same plan, brought this action pursuant to 42 U.S.C. § 1983 alleging that the plan violated the one-person, one-vote principle of the Fourteenth Amendment under *Reynolds v. Sims*, 377 U.S. 533 (1964). In particular, Appellants claimed that the Texas Senate map violated this principle because "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970).

The district court dismissed Appellants' suit for failing to state a claim upon which relief can be granted. The district court held that the Texas Legislature's decision to create Senate districts using total population is judicially unreviewable. The district court reached that conclusion here despite the fact that doing so fails to ensure that the votes of citizens in one part of Texas are given approximately the same weight as the votes of citizens in another part of Texas.

The district court's ruling raises an issue warranting plenary review. This Court has repeatedly explained that the issue remains unsettled, and Justice Thomas has urged the Court to decide it on certiorari review. Further, the merits of the claim have been the subject of robust debate in the courts of appeals. Judge Kozinski issued an opinion concluding that the claim Appellants bring here is not only serious but should prevail. The Fourth and Fifth Circuits later disagreed with Judge Kozinski on the merits of the claims, adopting the political question rationale the district court employed in this case. The district court likewise found the issue to be a close question. An issue attracting this much attention and debate certainly is not so insubstantial as to justify summary affirmance.

Indeed, Appellants clearly have a meritorious claim if the one-person, one-vote principle provides *any* protection to voters. Under the district court's reasoning, the Texas Legislature could have adopted a Senate map containing 31 districts of equal total population without violating the one-person, one-vote principle—even if 30 of the districts each contained one voter and the 31st district contained all other voters in the State. That cannot be correct. The one-person, one-vote principle, by its terms, entitles voters to an equal vote. Unless the districting process no longer protects that right, the judgment below cannot stand.

Dismissal was particularly inappropriate given that the Complaint alleged that, based on Texas's own data, it could have created districts equalizing voter population *and* total population to a significant degree. Texas thus will be not deprived of flexibility to adopt a State Senate plan that best suits the needs of its residents if Appellants prevail. Deciding this substantial question in Appellants'

favor will merely ensure that voters are afforded the basic right to an equal vote the Fourteenth Amendment affords them. The Court should note probable jurisdiction and set the case for oral argument.

STATEMENT

I. The One-Person, One-Vote Principle

This Court has long held that the Equal Protection Clause includes a one-person, one-vote principle under which "all who participate in [an] election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Reynolds*, 377 U.S. at 557-58 (citations and quotations omitted); *see also Hadley*, 397 U.S. at 56 (explaining that the Equal Protection Clause "requires that each qualified voter must be given an equal opportunity to participate in that election"). In short, the one-person, one-vote principle guarantees an equal vote to all voters. *See Reynolds*, 377 U.S. at 562.

Thus, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley*, 397 U.S. at 56; *Reynolds*, 377 U.S. at 568. Although the Equal Protection Clause does not require that the population of each district be absolutely equal, *Brown v. Thomson*, 462 U.S. 835, 842 (1983), it does forbid "substantial variation" from this constitutional norm, *Avery v. Midland County*, 390 U.S. 474, 485 (1968). A population deviation between the

largest and smallest districts of 10% or more is prima facie evidence of a one-person, one-vote violation triggering the government's duty to set forth a compelling justification for the deviation. *Brown*, 462 U.S. at 852; *White v. Regester*, 412 U.S. 755, 763 (1973); *Mahan v. Howell*, 410 U.S. 315, 329 (1973). A population deviation large enough can be *per se* unconstitutional. *Id.*

II. The Texas Senate Redistricting

The one-person, one-vote principle requires States to revise their apportionment schemes every ten years to account for population shifts and changes. *See Reynolds*, 377 U.S. at 583-84. To that end, Section 28, Article III of the Texas Constitution requires the Texas Legislature to reapportion the Texas Senate at its first regular session following the publication of each federal decennial Census. In response to the 2010 Census, the Texas Legislature undertook the task of reapportioning the Texas Senate.

Section 25, Article III of the Texas Constitution provides that "[t]he State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator." The Texas Constitution does not otherwise restrict districting by county, city, or other boundaries. The Texas Constitution previously required that "[t]he State shall be divided into Senatorial Districts of contiguous territory according to the number of qualified electors, as nearly as may be ... and no single county shall be entitled to more than one Senator." In 1981, the Texas Attorney General opined that Section 25's requirement to divide the State into Senatorial Districts according to the number of qualified voters was "unconstitutional on its face as inconsistent with

the federal constitutional standard." Tex. Att'y Gen. Op. No. MW-350 (1981). In 2001, Section 25 was amended to eliminate the requirement to draw Senate districts "according to the number of qualified electors." In 2011, in accordance with the Attorney General's 1981 opinion and Section 25, as amended, the Texas Legislature redrew the State senatorial districts without taking into consideration the number of voters or potential voters in each district.

The Texas Legislature initially created Plan S148 as a redistricting plan for the Texas Senate. Former Governor Rick Perry signed H.B. 150 (a bill containing the congressional, State Senate, and State House redistricting plans, including Plan S148) into law on June 17, 2011. All three plans were challenged in federal court on various grounds. A three-judge panel of the United States District Court for the Western District of Texas determined there was a "not insubstantial claim" that Plan S148 violated Section 5 of the Voting Rights Act, and it created Plan S172 as an interim map for the 2012 State Senate elections. *See Davis v. Perry*, 991 F. Supp. 2d 809, 817-18 (W.D. Tex. 2014). On June 21, 2013, the Texas Legislature passed a bill making Plan S172 the permanent Senate map. Governor Perry signed Plan S172 into law on June 26, 2013.

As part of the districting process, Texas calculated the number of actual or potential voters in each Senate district in Plan S172 under various voting metrics. These data include: (1) the Citizen Voting Age Population ("CVAP") from the three American Community Surveys ("ACS") the Census Bureau conducted closest in time to the creation of Plan S172 in 2012; (2) the total voter registration numbers Texas released in 2008 and 2010; and (3) the non-suspense voter registration numbers Texas released in 2008 and

2010.[1] Set out below are tables showing the population variations from the "ideal" Senate district using Texas's data. App. 26a-30a; Supplemental Appendix ("SA") 2-12. The "ideal" Senate district is the total relevant population statewide, divided by 31 (the number of Senate districts).[2] As Table 1 demonstrates, Plan S172 deviates from the "ideal" district by roughly 46% to 55% depending on which voter-based metric is utilized.

---

1. Non-suspense voter registration is total voter registration minus the number of previously registered voters who fail to respond to a confirmation of residence notice sent by the county voter registrar.

2. For example, the statewide CVAP from the 2007-2011 ACS was 15,581,580. SA-9. That means that the "ideal" Senate district would contain 502,632 citizens of voting age, *i.e.*, the number of potential voters. The percentage deviation is then determined by summing its maximum upward and downward percentage deviations from the "ideal" district. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842, 846 (1983); *Connor v. Finch*, 431 U.S. 407, 416-18 (1977); *White v. Regester*, 412 U.S. 755, 761, 764 (1973).

TABLE 1

POPULATION VARIATIONS FROM THE IDEAL SENATE DISTRICT UNDER PLAN S172

Voter Metric	Deviation From Ideal District (%)
Citizen Voting Age Population (2005-2009)	47.87%
Citizen Voting Age Population (2006-2010)	46.77%
Citizen Voting Age Population (2007-2011)	45.95%
Total Voter Registration (2008)	51.14%
Total Voter Registration (2010)	55.06%
Non-Suspense Voter Registration (2008)	51.32%
Non-Suspense Voter Registration (2010)	53.66%

III. This Litigation

Appellant Sue Evenwel is a registered voter residing in Senate District 1 under Plan S172. Appellant Edward Pfenninger is a registered voter residing in Senate District 4 under Plan S172. Both vote regularly. App. 5a. Tables 2 and 3 compare the number of voters or potential voters in Senate District 1 and Senate District 4 under Plan S172, respectively, to the Senate district under Plan S172 with the lowest number of voters or potential voters, expressed as a percentage deviation from the Senate "ideal" district and as a ratio of relative voting strength.

TABLE 2

SENATE DISTRICT 1 DEVIATION AND VOTING POWER

Voter Metric	Senate District 1	Low Senate District	Absolute Difference	Deviation From Ideal District (%)	Voting Power
Citizen Voting Age Population (2005-2009)	557,525	358,205	199,320	41.49%	1:1.56
Citizen Voting Age Population (2006-2010)	568,780	367,345	201,435	40.88%	1:1.55
Citizen Voting Age Population (2007-2011)	573,895	372,420	201,475	40.08%	1:1.54
Total Voter Registration (2008)	513,259	297,692	215,567	49.23%	1:1.72
Total Voter Registration (2010)	489,990	290,230	199,760	46.69%	1:1.69
Non-Suspense Voter Registration (2008)	437,044	256,879	180,165	47.76%	1:1.84
Non-Suspense Voter Registration (2010)	425,248	252,087	173,161	47.23%	1:1.69

TABLE 3

SENATE DISTRICT 4 DEVIATION AND VOTING POWER

Voter Metric	Senate District 4	Low Senate District	Absolute Difference	Deviation From Ideal District (%)	Voting Power
Citizen Voting Age Population (2005-2009)	506,235	358,205	148,030	30.81%	1:1.41
Citizen Voting Age Population (2006-2010)	521,980	367,345	154,635	31.38%	1:1.42
Citizen Voting Age Population (2007-2011)	533,010	372,420	160,590	31.95%	1:1.43
Total Voter Registration (2008)	468,949	297,692	171,257	39.11%	1:1.58
Total Voter Registration (2010)	466,066	290,230	175,836	41.10%	1:1.61
Non-Suspense Voter Registration (2008)	409,923	256,879	153,044	40.57%	1:1.60
Non-Suspense Voter Registration (2010)	406,880	252,087	154,793	42.22%	1:1.61

As Tables 2 and 3 demonstrate, Appellants live in districts that substantially deviate (between 31% and 49%) from the "ideal" Senate districts in terms of number of voters or potential voters. There are voters or potential voters in Texas whose Senate votes are worth approximately one and one-half times that of Appellants.

Appellants filed suit in the United States District Court for the Western District of Texas pursuant to 42 U.S.C. § 1983 challenging Plan S172 as violating the one-person, one-vote principle of the Equal Protection Clause, and seeking a permanent injunction against its further enforcement. App. 34a. A district court of three judges was convened to hear the suit in accordance with 28 U.S.C. § 2284. Appellees filed a motion to dismiss; Appellants moved for summary judgment. The district court stayed briefing on the summary judgment motion pending the outcome of the motion to dismiss.

On November 5, 2014, the district court granted the motion to dismiss. App. 3a-14a. The court recognized that the "crux of the dispute is Plaintiffs' allegations that the districts vary widely in population when measured against various voter-population metrics." App. 5a. Relying primarily on *Burns v. Richardson*, 384 U.S. 73 (1966), the district court rejected the claim. Following the rationale that the Fourth Circuit and Fifth Circuit had previously adopted, the court held that the choice of which population base to use in apportioning districts is "left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." App. 13a (citing *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996)).

According to the district court, "the decision whether to exclude or include individuals who are ineligible to vote from an apportionment base 'involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.'" App. 11a (quoting *Burns*, 384 U.S. at 92). The court thus held that Appellants' claim that the Texas Legislature was required to ensure voter equality in the districting process was judicially unreviewable and dismissed the lawsuit for failing to state a claim. In the district court's judgment, Appellants had raised a "'close but ultimately unavailing legal theory.'" App. 14a (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (alterations omitted)). This timely appeal followed.

THE QUESTION PRESENTED IS SUBSTANTIAL

The only issue the Court must decide at this stage is whether to note probable jurisdiction and set the case for oral argument or instead to summarily affirm the district court's decision. The Court should grant plenary review because the question presented is substantial. In fact, the appeal raises an important and unsettled constitutional question that would meet the more stringent criteria for certiorari. The one-person, one-vote principle protects the rights of *voters* to an equal *vote*. A statewide districting plan that distributes voters or potential voters in a grossly uneven way therefore is patently unconstitutional under *Reynolds* and its progeny.

I. This Appeal Presents A Substantial Question.

The Court notes probable jurisdiction in direct appeals and sets the case for oral argument so long as

the question presented is "a substantial one." *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). That standard is not demanding. Plenary review is warranted unless "after reading the condensed arguments presented by counsel in the jurisdictional statement and the opposing motion, as well as the opinion below, the Court can reasonably conclude that there is so little doubt as to how the case will be decided that oral argument and further briefing would be a waste of time." E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* 304 (10th ed. 2013).

The question this appeal presents, "which asks what measure of population should be used for determining whether the population is equally distributed among the districts," is obviously substantial. *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001) (Thomas, J., dissenting from the denial of certiorari). The Court has "never determined the relevant 'population' that States and localities must equally distribute among their districts." *Id.* The sizable hole in the one-person, one-vote principle left by the failure to resolve this important issue alone justifies plenary review. *See id.* ("The one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population. But as long as we sustain the one-person, one-vote principle, we have an obligation to explain to States and localities what it actually means.").

Judge Kozinski's separate opinion in *Garza v. County of Los Angeles*, 918 F.2d 763, 773-88 (9th Cir. 1991), confirms that the question presented by this appeal is substantial. In *Garza*, the Ninth Circuit panel majority ruled that Los Angeles County was constitutionally *required* to use total Census population in redistricting,

regardless of the effect that it would have on the number of voters in each district. In the Ninth Circuit's view, because "the people, including those who are ineligible to vote, form the basis for representative government," total population was the "appropriate basis for state legislative apportionment" given that the Census counts non-voters. *Id.* at 774.

The Ninth Circuit held that using voter population as the districting base would violate the Equal Protection Clause by producing "serious population inequalities across districts" that in turn would cause "[r]esidents of the more populous districts [to have] less access to their elected representative." *Id.* The Ninth Circuit further held that using voter population as the districting base would violate the Petition Clause of the First Amendment by denying non-voters fair access to elected officials. *See id.* at 775 ("Interference with individuals' free access to elected representatives impermissibly burdens their right to petition the government.").

Judge Kozinski disagreed. Not only did he find the argument for voter population as the apportionment base to be substantial, Judge Kozinski concluded that the claim should prevail. While acknowledging there are reasonable arguments on both sides of the issue, Judge Kozinski determined that the theory "at the core of one person one vote is the principle of electoral equality, not that of equality of representation." *Id.* at 782 (Kozinski, J., concurring in part and dissenting in part). The one-person, one-vote principle "assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location." *Id.* That is, Judge Kozinski found that

the Equal Protection Clause "protects a right belonging to the individual elector and the key question is whether the votes of some electors are materially undercounted because of the manner in which districts are apportioned." *Id.*

Judge Kozinski thus concluded that apportioning districts based only on total population violates the one-person, one-vote principle if it leads to malapportionment of voters or potential voters. *See id.* ("[T]he name by which the Court has consistently identified this constitutional right—one person, one vote—is an important clue that the Court's primary concern is with equalizing the voting power of electors, making sure that each voter gets one vote—not two, five, ten, or one-half.") (citation omitted). It cannot seriously be argued that Judge Kozinski's opinion is not only wrong, but so clearly wrong that oral argument and full briefing would be a waste of time.

Finally, even the Fifth Circuit—while disagreeing with Judge Kozinski—acknowledged that this "is a close question." *Chen*, 206 F.3d at 523. Writing for the panel, Judge Garwood noted that the "Supreme Court has from the beginning of this line of cases been somewhat evasive in regard to which population must be equalized." *Id.* at 524; *see also Daly*, 93 F.3d at 1222. The Fifth Circuit further recognized that Judge Kozinski had made "a powerful case that the general tenor of the Court's opinions mandates protection of the individual potential voter." *Chen*, 206 F.3d at 525. That the Fifth Circuit, after lengthy analysis, reached a different answer than Judge Kozinski as to how this important issue should be decided, *see id.* at 525-28, does not undermine the substantiality of the question presented. This difference

of views confirms that this appeal meets the Court's well-established standard for plenary review. Indeed, even the district court agreed that this is a "close" question. App. 14a (citation and quotations omitted).

In short, this is not a petition for writ of certiorari in which the Court must decide whether to grant review based upon a multitude of factors beyond the case's merits. This is a direct appeal from a three-judge district court's decision resolving a constitutional challenge to a statewide redistricting plan. All the Court must decide at this stage, then, is whether Appellants' one-person, one-vote claim has enough substance to warrant full briefing and oral argument or whether the challenge is so frivolous as to justify summary affirmance. That is not a hard choice here. This appeal presents a substantial federal question.

II. The District Court Incorrectly Decided This Important And Yet Unsettled One-Person, One-Vote Question.

Even if this case were not an appeal, it would merit review. As noted above, the Court has not yet settled this constitutional issue. *See supra* at 13; *Burns*, 384 U.S. at 91 (noting that the Court has "carefully left open the question [of] what population" base is paramount for one-person, one-vote purposes); *Hadley*, 397 U.S. at 58 n.9 (same). By not deciding the issue, the Court has "left a critical variable in the requirement undefined." *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from denial of certiorari); *see also Garza*, 918 F.3d at 785 (Kozinski, J., concurring in part and dissenting in part). It is vitally important the Court settle the issue now.

A. The Court's One-Person, One-Vote Decisions Make Clear That Voters Have A Right To An Equal Vote.

The Equal Protection Clause protects "the right of all qualified citizens to vote." *Reynolds*, 377 U.S. at 554. The right to vote is fundamental. *See Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). A citizen therefore "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *see also Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.").

Importantly, this equal-protection right secures more than ballot access. It also ensures that the vote of any one voter once cast is accorded equal weight relative to every other voter. As the Court has explained, "[w]ith respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live." *Reynolds*, 377 U.S. at 565. The premise of the one-person, one-vote principle, accordingly, is that "all who participate in [an] election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographic unit." *Id.* at 557-58. "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living [in] other parts of the State." *Id.* at

568; *see id.* at 567 ("[T]he weight of a citizen's vote cannot be made to depend on where he lives.").

Reynolds could not have been clearer: the one-person, one-vote principle secures the right of *voters* to an equal *vote*. *See Garza*, 918 F.2d at 782 (Kozinski, J., concurring in part and dissenting in part) ("References to the personal nature of the right to vote as the bedrock on which the one person one vote principle is founded appear in the case law with monotonous regularity."). To be sure, using total population as the exclusive apportionment base often will protect the Fourteenth Amendment rights of voters because "eligible voters will frequently track the total population evenly." *Chen*, 206 F.3d at 525; *see also Garza*, 918 F.2d at 781 (Kozinski, J., concurring in part and dissenting in part). But that will not always be true. Where, as in Texas, large numbers of non-voters swell the population of certain geographic locations, the exclusive use of total population as the apportionment base will fail to protect the individual constitutional right to cast an equally weighted vote.

Using total population to equalize districts therefore will not suffice to protect the constitutional rights of voters under all circumstances. For that reason, using total population in redistricting has always been understood as a means of protecting voters from having their votes diluted rather than an end to be achieved for its own sake. "[T]he overriding objective must be substantial equality of population among the various districts, *so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.*" *Reynolds*, 377 U.S. at 579 (emphasis added); *Connor v. Finch*, 431 U.S. 407, 416 (1977) ("The Equal Protection Clause requires

that legislative districts be of nearly equal population, *so that each person's vote may be given equal weight in the election of representatives.*" (emphasis added)); *Garza*, 918 F.2d at 783 (Kozinski, J., concurring in part and dissenting in part) ("[A] careful reading of the Court's opinions suggests that equalizing total population is viewed not as an end in itself, but as a means of achieving electoral equality.").

At base, "the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote." *Reynolds*, 377 U.S. at 561; *see, e.g., Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989). Thus, when there is a significant discrepancy between the total and voting populations, other data must be incorporated into the districting process to ensure that voters' equal-protection rights are not infringed. *See Gaffney v. Cummings*, 412 U.S. 735, 746 (1973) ("[T]otal population ... may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because 'census persons' are not voters.").

B. The District Court's Ruling Fails To Protect The Right Of Voters To An Equal Vote.

The district court's decision, which refused to protect the right of voters to an equal vote, is untenable under governing precedent. Adopting the rationale of *Chen* and *Daly*, the district court held that the choice of an apportionment base is "left to the states absent the unconstitutional inclusion or exclusion of specific protected

groups of individuals." App. 13a. In the district court's view, making the choice between total and voter population judicially reviewable "would lead federal courts too far into the 'political thicket.'" *Daly*, 93 F.3d at 1227 (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J., concurring)); *see also Chen*, 206 F.3d at 528 (finding "no justification to depart from the position of *Daly*"). Thus, the district court subscribed to the rationale that "the choice of population figures is a choice left to the political process." *Chen*, 206 F.3d at 523.

The conclusion that the choice between total and voter population as the apportionment base is an unreviewable political question cannot be squared with this Court's decisions. The Court settled the political-question issue in favor of justiciability more than 50 years ago. In *Baker v. Carr*, which was the first decision to find a vote dilution challenge to a legislative apportionment claim justiciable under the Fourteenth Amendment, the Court found the plaintiffs had standing as "*voters* of the State of Tennessee" and that "*voters* who allege facts showing disadvantage to themselves as individuals have standing to sue." 369 U.S. 186, 204, 206 (1962) (emphasis added). On that basis, the Tennessee voters' apportionment challenge was held to be "justiciable, and if discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Id.* at 209-10.

In other words, it was the plaintiffs' status as voters that afforded them Article III standing and it was their right to an undiluted vote under the Equal Protection Clause that made the constitutional claim justiciable. *See*

Gray, 372 U.S. at 375 & n.7. Absent those features, there is no reason to believe that the Court would have declared a judicially enforceable one-person, one-vote right in the first place.

Two years after *Baker*, *Reynolds* confirmed that the equal protection rights of voters cannot be relegated to the political process by firmly rejecting the very reasoning that the district court employed here:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

377 U.S. at 566. Indeed, the many decisions examining whether an apportionment plan utilized the appropriate population base for one-person, one-vote purposes were wrongly decided if, as *Chen* and the district court found, that issue is committed to the political process and is therefore unreviewable. *See, e.g.*, *Avery*, 390 U.S. 474; *Hadley*, 397 U.S. 50; *Dunn*, 405 U.S. 330; *Mahan*, 410 U.S. 315; *White*, 412 U.S. 755; *Chapman v. Meier*, 420 U.S. 1 (1975); *Brown*, 462 U.S. 835; *Connor*, 421 U.S. 407; *Morris*, 489 U.S. 688.

Accordingly, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized" by this Court. *Reynolds*, 377 U.S. at 562; *see also Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) ("[S]tate apportionment statutes, which may dilute the effectiveness of some citizens' votes, receive close scrutiny from this Court.") (citation omitted)). Having "crossed the Rubicon," *Branch v. Smith*, 538 U.S. 254, 278 (2003), and found an enforceable one-person, one-vote principle in the Fourteenth Amendment, the Court cannot retreat to the political question doctrine when subsidiary issues must be resolved to determine whether voters' rights have been infringed, *see Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting in the denial of certiorari).

Despite the Court's determination that the one-person, one-vote right is judicially protectable, the district court held that *Burns* decisively resolved the issue in favor of unreviewablility. In particular, the district court read *Burns* as standing for the proposition that the choice of population base is "left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals," App. 13a, because the legislature's "decision whether to exclude or include individuals who are ineligible to vote from an apportionment base 'involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.'" App. 11a (quoting *Burns*, 384 U.S. at 92).

The district court's reliance on *Burns* was misplaced. At most, the case left unresolved the question presented here. *See Burns*, 384 U.S. at 91 ("Although total population figures were in fact the basis of comparison in [*Reynolds*] and most of the others decided that day, our discussion carefully left open the question what population was being

referred to."). The Court has, in fact, explained that the question remains unsettled in decisions that post-date *Burns*. *See, e.g.*, *Hadley*, 397 U.S. at 58 n.9; *see also Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from the denial of certiorari); *Garza*, 918 F.3d at 785 (Kozinski, J., concurring in part and dissenting in part); *Daly*, 93 F.3d at 1222. *Burns* cannot fairly be read as resolving an issue that it went out of its way to note remains unresolved—and certainly not without expressly stating that the Court was resolving it.

If anything, the outcome in *Burns* indicates Appellants have the better argument. There, Hawaii had redistricted using registered voters as the population base in order to exclude military personnel and other transients who were counted in the Census but not registered to vote in that State. *See Burns*, 384 U.S. at 90-91. While the plan created deviations between districts of over 100% with respect to total population (*i.e.*, certain districts contained twice as many residents as others), the districts had only minor deviations in the numbers of registered voters. *See id.* at 90-91 & n.18. The Court upheld Hawaii's decision to rely on registered voters to apportion districts against an equal protection challenge arguing that Hawaii was obligated to use total population instead. *See id.* at 93. The Court concluded that using total population, given the high concentration of non-voters in Oahu, would have been "grossly absurd and disastrous." *Id.* at 94.

The district court's reading of *Burns* as holding that the choice of population base is "left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals," App. 13a, also cannot be reconciled with *Burns* itself. If that were true, there would have been no reason to closely examine whether Hawaii's choice of

registered voters as a population base was permissible. *See Burns*, 384 U.S. at 93-97. After reiterating that the only question before it was whether Hawaii's plan fell "short of federal constitutional standards," *id.* at 86, the Court expressed concern that use of registered voters made one-person, one-vote rights depend "not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote," *id.* at 92. Upon studying the issue and the specific facts of the case, the Court held that despite the imperfections in using registered voters as a districting base, and "with a view to its interim use, Hawaii's registered voter basis does not on this record fall short of constitutional standards." *Id.* at 97. If the district court's reading of *Burns* were correct, the Court would have been barred from examining Hawaii's choice of registered voters over state citizenship.

The district court's reliance on this Court's statement that the decision whether "to 'include or exclude' groups of individuals ineligible to vote from an apportionment base ... 'involves choices about the nature of representation' with which the Court has 'been shown no constitutionally founded reason to interfere'" therefore was misplaced. App. 11a (quoting *Burns*, 384 U.S. at 92). That statement just begs the question this appeal presents. To this juncture, the Court has found no reason to interfere with a State's use of total population alone to redistrict because the use of total population has adequately protected the rights of voters. But *Burns* can in no way be read as a retreat from the proposition that, under *Reynolds*, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable that *equal numbers of voters can vote for proportionally equal numbers of officials*." *Hadley*, 397 U.S. at 56 (emphasis added).

Finally, the district court's judgment cannot be upheld on alternative grounds. The only other rationale that has ever been offered as a justification for denying voters an equal vote is the Ninth Circuit's "access" theory. *See supra* at 13-14. But the Ninth Circuit's conclusion that a non-voter's "access" right is superior to a voter's right to an equal vote is unsustainable as a matter of constitutional principle. The one-person, one-vote principle protects voters. *See Garza*, 918 F.2d at 773-88 (Kozinski, J., concurring in part and dissenting in part). Further, the contention that States *must* use total population cannot be reconciled with *Burns* given that Hawaii used registered voters. *See Chen*, 206 F.3d at 526. The prevailing rule in the Ninth Circuit is indefensible.

III. The Judgment Below Is Unsustainable If The One-Person, One-Vote Principle Is Meant To Ensure Voter Equality.

The district court's dismissal of Appellants' claim must be reversed if the one-person, one-vote principle requires Texas to protect voter equality to any reasonable degree. As noted, a difference in relevant population between the largest and smallest districts of 10% or more is *prima facie* evidence of a one-person, one-vote violation, requiring the State to have a compelling justification for the deviation; a large enough deviation can be *per se* unconstitutional. *See supra* at 4-5.

It is undisputed that the voter population deviations here exceed the 10% threshold needed for Appellants to state a claim under any metric that could possibly be used as a proxy for the number of voters in Plan S172. *See supra* at 8-10. No more is required to resolve this appeal in their

favor. But it is worth noting that the massive population deviations at issue make this a particularly appropriate case for resolving the important constitutional question presented.

First, that the population deviations are large enough to render Plan S172 *per se* unconstitutional makes this an easy case. The Court has found that a 16.4% population deviation "may well approach tolerable limits" regardless of the State's reasons for it. *Mahan*, 410 U.S. at 329. As Table 1 shows, the deviations at issue in this case are double or triple those examined in *Mahan*. As Tables 2 and 3 show, the deviations of Appellants' districts from the ideal districts are equally egregious. District 1 ranges from 40.08% to 49.23% under the various available metrics for calculating voter population. *See supra* at 9. For District 4, the deviation from the ideal district is anywhere from 30.81% to 42.22% based on those same figures. *See id.* at 10.

As the Court has explained, such massive disparities in voter population between Senate districts are patently unconstitutional:

> [I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could

> vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable.

Reynolds, 377 U.S. at 562; *Morris*, 489 U.S. at 698 ("[A] citizen is ... shortchanged if ... he may vote for one representative and the voters of another district half the size also elect one representative."). If the one-person, one-vote principle has any force, the voting power differences present in this case are impermissible under *Reynolds*. Conversely, if voter population deviations this large are sustained, then the one-person, one-vote principle offers *no* protection for voters.

Second, the size of these voter population deviations shows that the Texas Legislature did not make an "honest and good faith effort" to apportion districts with roughly equal numbers of voters. *Mahan*, 410 U.S. at 324. Rather, the Texas Legislature labored under the misapprehension that the one-person, one-vote principle somehow *required* it to ignore voters altogether and to focus exclusively on total population instead. *See supra* at 5-6. The Court is appropriately cognizant of each State's sovereign authority to implement a variety of "legitimate objectives" beyond equalizing voting population through apportionment. *Brown*, 462 U.S. at 842; *see also Abate v. Mundt*, 403 U.S. 182, 185 (1971); *Reynolds*, 377 U.S. at 578-79. But Texas could not have properly exercised

any discretion it holds to consider these other factors given that it has been operating pursuant to the Attorney General's 1981 opinion that it would be unconstitutional to base districting on voter population. Texas's failure to take voter equality into account therefore renders it unable to meet its burden even if it only is required to provide a satisfactory explanation that the "deviations ... 'are based on legitimate considerations incident to the effectuation of a rational state policy.'" *Swann v. Adams*, 385 U.S. 440, 444 (1967) (quoting *Reynolds*, 377 U.S. at 533)).

Third, and last, even a conclusion here that Texas had a right or obligation under the Equal Protection Clause to equalize total population cannot save Plan S172. Based on Texas's own data, the legislature could have protected the interests of voters without foregoing consideration of total population as well. App. 24a, 33a. As Appellants have alleged, "[u]sing standard GIS software, one can readily adjust the boundaries of the districts in Plan S172 to create numerous alternatives to Plan S172." SA-2. Given the range of options available to the Texas Legislature, there were "many feasible ways to eliminate gross deviations" in voter population using this same 31-district map as a starting point "without causing significantly larger deviations in total population." SA-3. Unless Texas is prepared to dispute the accuracy of its own data at summary judgment (after Appellants prevail on appeal), then, there is no defensible claim that Texas will be deprived of substantial flexibility to adopt a Senate apportionment plan that best suits the needs of its residents.

In the end, the only conceivable basis for summarily affirming this decision would be the Court's conclusion that the one-person, one-vote principle so clearly affords voters *no* constitutional protection that briefing and oral argument would be a waste of time. That cannot be right. Under the district court's reasoning, the Texas Legislature could have adopted a Senate map containing 31 districts of equal total population without violating the one-person, one-vote principle—even if 30 of the districts each contained one voter and the 31st district contained all other voters in the State. The idea that this hypothetical districting plan could survive one-person, one-vote review (let alone warrant summary affirmance) is facially absurd; that it would prevail under the district court's rationale is thus reason enough to grant plenary review.

Whatever other considerations may come within the Equal Protection Clause's ambit, the Court's decisions are clear that it protects the rights of voters to an equally weighted vote, and that the legislature's redistricting responsibility does not always terminate with equalization of total population. Even assuming that the Fourteenth Amendment protects both equal voting power and equal political access, Texas at a bare minimum must approach apportionment in a manner that reconciles both of these interests to the maximum extent feasible. Thus, whether Texas can, as it did here, advance total population equality in complete derogation of voter population equality raises a substantial question.

CONCLUSION

The Court should note probable jurisdiction and set this case for oral argument.

Respectfully submitted,

BRENDAN J. MORRISSEY
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006

MEREDITH B. PARENTI
PARENTI LAW PLLC
7500 San Felipe
Suite 600
Houston, TX 77063

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PLLC
3033 Wilson Blvd, Suite 700
Arlington, VA 22201
(703) 243-9423
will@consovoymccarthy.com

Counsel for Appellants

February 2, 2015

APPENDIX

APPENDIX A — PLAINTIFFS' NOTICE OF APPEAL IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED DECEMBER 4, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Civil Action No. 1:14-cv-335

SUE EVENWEL; EDWARD PFENNINGER,

Plaintiffs,

v.

RICK PERRY, in his official capacity as Governor of Texas; NANDITA BERRY, in her official capacity as Texas Secretary of State,

Defendants.

PLAINTIFFS' NOTICE OF APPEAL

Plaintiffs Sue Evenwel and Edward Pfenninger ("Plaintiffs") appeal to the Supreme Court of the United States under 28 U.S.C. § 1253 from the district court's November 5, 2014 Final Judgment denying a permanent injunction in this civil action, which was heard and determined by a district court of three judges under 28 U.S.C. § 2284(a).

DATED: December 4, 2014

Respectfully submitted,

/s/ Meredith B. Parenti
Meredith B. Parenti
Texas Bar No. 00797202
PARENTI LAW PLLC
7500 San Felipe, Suite 600
Houston, TX 77063
Tel.: (281) 224-5848
Fax: (281) 605-5677
meredith@parentilaw.com

William S. Consovoy (pro hac vice)
Thomas R. McCarthy
J. Michael Connolly
CONSOVOY MCCARTHY PLLC
3033 Wilson Boulevard
Suite 700
Arlington, Virginia 22201
Tel.: (703) 243-9423
Fax: (703) 243-9423
will@consovoymccarthy.com

Bert W. Rein (pro hac vice)
Brendan J. Morrissey
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
Tel.: (202) 719-7000
Fax: (202) 719-7049

ATTORNEYS FOR PLAINTIFFS

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, FILED NOVEMBER 5, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CAUSE NO. A-14-CV-335-LY-CH-MHS

SUE EVENWEL AND EDWARD PFENNINGER,

Plaintiffs,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, AND NANDITA BERRY, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,

Defendants.

MEMORANDUM OPINION AND ORDER

After this case was filed raising allegations implicating a statewide redistricting scheme, Fifth Circuit Chief Judge Carl Stewart appointed this three-judge panel to preside over the case. 28 U.S.C. § 2284. This court has federal-question jurisdiction. 28 U.S.C. §§ 1331, 1343(a)(3)-(4); 42 U.S.C. § 1983. Before the court are the Defendants' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can

be granted (Clerk's Doc. No. 15). The court heard oral argument on the motion on June 25, 2014. Also pending are Plaintiffs' motion for summary judgment (Clerk's Doc. No. 12) and a motion to intervene filed by the Texas Senate Hispanic Caucus, and others (Clerk's Doc. No. 25). For the following reasons, we GRANT Defendants' Motion to Dismiss. Accordingly, we DISMISS Plaintiffs' motion for summary judgment and the motion to intervene.

I. Background

The Texas Legislature is required by the Texas Constitution to reapportion its senate districts during the first regular session after the federal decennial census. Tex. Const, art. III, § 28. It is undisputed that, after publication of the 2010 census, the Texas Legislature created redistricting PLANS148[1] and passed it as part of Senate Bill 31, which Texas Governor Rick Perry signed into law June 17, 2011. *See* Act of May 21, 2011, 82nd Leg., R.S.,ch.1315, 2011 Tex. Sess. Law Serv. 3748. A separate three-judge panel of the United States District Court for the Western District of Texas found that there was a not insubstantial claim that PLANS148 violated the federal Voting Rights Act, and issued an interim plan, PLANS172, for the 2012 primary elections. *See Davis v. Perry*, 991

1. The Legislature identifies the redistricting plans referred to in this opinion as the plans are identified "on the redistricting computer system operated by the Texas Legislative Council." This court will do the same. *See* Act of May 21, 2011, 82nd Leg., R.S., ch. 1315, 2011 Tex. Sess. Law Serv. 3748 ("PLANS148"); Act of June 21, 2013, 83rd Leg., 1st C.S. ch. 1, 2013 Tex. Sess. Law Serv. 4677 ("PLANS172").

Appendix B

F. Supp. 2d 809, 2014 WL 106990, at *3 (W.D. Tex. 2014). Thereafter, the Texas Legislature adopted and Governor Perry signed into law PLANS172, as the official Texas Senate districting plan. *See* Act of June 21, 2013, 83rd Leg., 1st C.S. ch. 1, 2013 Tex. Sess. Law Serv. 4677.

On April 21, 2014, Plaintiffs Sue Evenwel and Edward Pfenninger filed this suit against Governor Perry and Texas Secretary of State Nandita Berry in their official capacities. Plaintiffs allege that they are registered voters who actively vote in Texas Senate elections. Evenwel lives in Titus County, part of Texas Senate District 1, and Pfenninger lives in Montgomery County, part of Texas Senate District 4.

Plaintiffs allege that, in enacting PLANS172, the Texas Legislature apportioned senatorial districts to achieve a relatively equal number of individuals based on total population alone. Plaintiffs concede that PLANS172's total deviation from ideal, using total population, is 8.04%. The crux of the dispute is Plaintiffs' allegation that the districts vary widely in population when measured using various voter-population metrics.[2] They further allege that it is possible to create districts that contain both relatively equal numbers of voter population and relatively equal numbers of total population. They conclude that PLANS 172 violates the one-person, one-vote principle of the Equal Protection Clause by not apportioning districts

2. Plaintiffs use the following metrics: citizen voting age population ("CVAP") from 2005-2009, 2006-2010, and 2007-2011; total voter registration from 2008 and 2010; and non-suspense voter registration from 2008 and 2010.

to equalize *both* total population and voter population. *See* 42 U.S.C. § 1983.

Defendants' motion to dismiss argues that there is no legal basis for Plaintiffs' claim that PLANS172 is unconstitutional for not apportioning districts pursuant to Plaintiffs' proffered scheme.

II. Standard of Review

Rule 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). The inquiry under Rule 12(b)(6) is whether, accepting all facts alleged in the complaint as true, the complaint states a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Importantly, legal conclusions need not be accepted as true. *Id.* Under Rule 12(b)(6), dismissal is proper if a claim is based on an ultimately unavailing legal theory. *See Neitzke v. Williams*, 490 U.S. 319, 326-27, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989).

III. Discussion

A state's congressional-apportionment plan may be challenged under the Equal Protection Clause in either of two ways: (1) that the plan does not achieve substantial equality of population among districts when measured using a permissible population base, *see Gaffney v. Cummings*, 412 U.S. 735, 744, 93 S. Ct. 2321, 37 L. Ed. 2d 298 (1973); or (2) that the plan is created in a manner that is otherwise invidiously discriminatory against a

protected group, *see id.* at 751-52. Plaintiffs' challenge falls only in the first category, so we address that theory.[3]

Here Plaintiffs must prove that the districting plan violates the Equal Protection Clause by demonstrating that the plan fails to achieve "substantial equality of population"—what Plaintiffs refer to as the "one-person, one-vote" principle. *Reynolds v. Sims*, 377 U.S. 533, 579, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964) ("[T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."); *id.* at 577 ("[T]he Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."); *see also Brown v. Thomson*, 462 U.S. 835, 842, 103 S. Ct. 2690, 77 L. Ed. 2d 214 (1983); *Gaffney*, 412 U.S. at 744. Under this approach, absolute mathematical equality is not necessary, as some deviation is permissible in order to achieve other legitimate state interests. *See Brown*, 462 U.S. at 842; *Reynolds*, 377 U.S. at 577-79. Furthermore, minor deviations, defined as "a maximum population deviation under 10%," fail to make out a prima facie case under this theory. *Brown*, 462 U.S. at 842-43.

In applying this framework, the Supreme Court has generally used total population as the metric of comparison. *E.g.*, *Brown*, 462 U.S. at 837-40; *Gaffney*, 412

3. To the extent Plaintiffs intended to allege the second theory, they have failed to do so plausibly.

U.S. at 745-50; *Reynolds*, 377 U.S. at 568-69. However, the Court has never held that a certain metric (including total population) *must* be employed as the appropriate metric. *See Burns v. Richardson*, 384 U.S. 73, 91-92, 86 S. Ct. 1286, 16 L. Ed. 2d 376 (1966) ("[T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured."). Instead, the Court has explained that the limit on the metric employed is that it must not itself be the result of a discriminatory choice and that, so long as the legislature's choice is not constitutionally forbidden, the federal courts must respect the legislature's prerogative. *Id.* at 92 (citation omitted).

Plaintiffs do not allege that the apportionment base employed by Texas involves a choice the Constitution forbids. Accordingly, Texas's "compliance with the rule established in *Reynolds v. Sims* is to be measured thereby." *Id.* Measuring it in this manner, the Plaintiffs fail to allege facts that demonstrate a prima facie case against Texas under *Reynolds v. Sims*. The Plaintiffs do not allege that PLANS172 fails to achieve substantial population equality employing Texas's metric of total population; to the contrary, they admit that Texas redrew its senate districts to equalize total population, and they present facts showing that PLANS172's total deviation from ideal, using total population, is 8.04%. Given that this falls below 10%, the Plaintiffs' own pleading shows that they cannot make out a prima facie case of a violation of the one-person, one-vote principle. *See Brown*, 462 U.S. at 842-43. Accordingly, they fail to state a claim upon which relief can be granted.

Plaintiffs attempt to avoid this result by relying upon a theory never before accepted by the Supreme Court or any circuit court: that the metric of apportionment employed by Texas (total population) results in an unconstitutional apportionment because it does not achieve equality as measured by Plaintiffs' chosen metric—voter population. *See Chen v. City of Houston*, 206 F.3d 502, 522 (5th Cir. 2000) (rejecting argument that City of Houston violated Equal Protection Clause by "improperly craft[ing] its districts to equalize total population rather than [CVAP]"), *cert. denied*, 532 U.S. 1046, 121 S. Ct. 2020, 149 L. Ed. 2d 1017 (2001); *Daly v. Hunt*, 93 F.3d 1212, 1222 (4th Cir. 1996) (rejecting argument that "voting-age population is the more appropriate apportionment base because it provides a better indication of actual voting strength than does total population"); *Garza v. Cnty. of L.A.*, 918 F.2d 763, 773-74 (9th Cir. 1990) (rejecting argument that decision to "employ[] statistics based upon the total population of the County, rather than the voting population, ... is erroneous as a matter of law"), *cert. denied*, 498 U.S. 1028, 111 S. Ct. 681, 112 L. Ed. 2d 673 (1991); *see also Lepak v. City of Irving, Texas*, 453 F. App'x 522 (5th Cir. 2011) (unpublished) (relying on *Chen* to reject argument that Equal Protection Clause requires equalizing districts based on CVAP as opposed to total population), *cert. denied*, 133 S. Ct. 1725, 185 L. Ed. 2d 786 (2013).[4]

---

4. Plaintiffs argue that circuit precedent, such as *Chen*, is not binding on a three-judge panel such as this one because, Plaintiffs assert, appeal is direct from the panel to the United States Supreme Court. Because we reach the same result as *Chen* regardless of whether it is binding precedent, we need not decide this question.

Plaintiffs argue that their theory is consonant with *Burns*, in which the Supreme Court faced a related argument. 384 U.S. at 81, 90. *Burns* involved a challenge to Hawaii's apportionment on the basis of registered-voter data. *Id.* Although Hawaii achieved substantial equality using its chosen metric, there were large disparities between districts when measured using total population. *Id.* at 90. The Court began by explaining that Equal Protection Clause jurisprudence has "*carefully left open* the question what population" base was to be used in achieving substantial equality of population. *Id.* at 91 (emphasis added). The Court then stated that a state's choice of apportionment base is not restrained beyond the requirement that it not involve an unconstitutional inclusion or exclusion of a protected group. *Id.* at 92 ("Unless a choice is one the Constitution forbids, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby." (citation omitted)). The Court explained that this amount of flexibility is

---

Plaintiffs also contend that the circuit court cases are distinguishable because, in this case, they do not ask the court to decide on behalf of the legislature which source of equality—electoral or representational—is supreme; rather they claim that substantial equality of population on both fronts is a constitutionally required choice where both can be achieved. This is a distinction without meaning. Regardless of whether both apportionment bases can be employed simultaneously, Plaintiffs ask us to find PLANS172 unconstitutional based on Plaintiffs' chosen apportionment base, even though the state employed a permissible apportionment base and achieved substantial equality of population doing so. This is the same request denied by the circuit courts that have reached the issue.

left to state legislatures because the decision whether to exclude or include individuals who are ineligible to vote from an apportionment base "*involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.*" *Id.* (emphasis added). In other words, it is not the role of the federal courts to impose a "better" apportionment method on a state legislature if that state's chosen method does not itself violate the Constitution.[5] *See also Perry v. Perez*, 132 S. Ct. 934, 942, 181 L. Ed. 2d 900 (2012) (addressing requirement that federal courts respect legislative choices even when redrawing lines to address constitutional concerns: "In the absence of any legal flaw ... in the State's plan, the District Court had no basis to modify that plan.")

Working from this starting point, the Supreme Court highlighted the concerns raised by using registered voters as the apportionment base as opposed to state citizenship

---

5. In addition to the statements in *Burns*, the Supreme Court has repeatedly emphasized that apportionment of legislative districts is a decision primarily entrusted to state legislatures, with which a federal court is to interfere only when the Constitution demands it. *See Reynolds*, 377 U.S. at 586 (acknowledging that reapportionment is first and foremost a matter for the legislature and judicial interference is appropriate "only when a legislature fails to reapportion according to federal constitutional requisites"); *see also Miller v. Johnson*, 515 U.S. 900, 915, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995); *Voinovich v. Quilter*, 507 U.S. 146, 156, 113 S. Ct. 1149, 122 L. Ed. 2d 500 (1993); *Growe v. Emison*, 507 U.S. 25, 34, 113 S. Ct. 1075, 122 L. Ed. 2d 388 (1993); *Chapman v. Meier*, 420 U.S. 1, 27, 95 S. Ct. 751, 42 L. Ed. 2d 766 (1975); *Gaffney*, 412 U.S. at 749-50.

or another permissible population base.[6] It then held that Hawaii's "apportionment satisfies the Equal Protection Clause *only because* on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." 384 U.S. at 93 (emphasis added). The permissible population base the Supreme Court considered in *Burns* was state citizenship. *Id.* 93-95. The Court was careful to note that its holding was limited to the specific facts before it and should not be seen as an endorsement of using registered voters

---

6. The Court described the additional problems presented by using registered voters or actual voters as an apportionment base:

> Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a ghost of prior malapportionment. Moreover, fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions. Such effects must be particularly a matter of concern where, as in the case of Hawaii apportionment, registration figures derived from a single election are made controlling for as long as 10 years.

Burns, 384 U.S. at 92-93 (citations and internal quotation marks omitted).

as an apportionment base. *Id.* at 96 ("We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere.").

Plaintiffs characterize *Burns* as the Court "ma[king] clear that the right of voters to an equally weighted vote is the relevant constitutional principle and that any interest in proportional representation must be subordinated to that right." Quite the contrary, the Supreme Court recognized that the precise question presented here—whether to "include or exclude" groups of individuals ineligible to vote from an apportionment base—"involves choices about the nature of representation" which the Court has "been shown no constitutionally founded reason to interfere." 384 U.S. at 92. Furthermore, the Supreme Court indicated problems in using one of the Plaintiffs' proposed metrics—registered voters—and ultimately measured the constitutionality of Hawaii's apportionment using the permissible population base of state citizenship. *See id.* at 92-93. We conclude that Plaintiffs are asking us to "interfere" with a choice that the Supreme Court has unambiguously left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals. We decline the invitation to do so. *See, e.g., Chen*, 206 F.3d 502; *Daly*, 93 F.3d 1212.

IV. Conclusion

The Plaintiffs have failed to plead facts that state an Equal Protection Clause violation under the recognized means for showing unconstitutionality under that clause. Further, Plaintiffs' proposed theory for proving an Equal

Protection Clause violation is contrary to the reasoning in *Burns* and has never gained acceptance in the law. For these reasons, we conclude that Plaintiffs' complaint fails to state a claim upon which relief can be granted. *See Neitzke*, 490 U.S. at 327 (noting that court may dismiss claim that "is based on a close but ultimately unavailing [legal theory]").

Accordingly, it is **ORDERED** that Defendants' Motion to Dismiss (Clerk's Doc. No. 15) is **GRANTED** and Plaintiffs' claims against the Defendants are **DISMISSED WITH PREJUDICE.**

It is further **ORDERED** that Plaintiffs' motion for summary judgment (Clerk's Doc. No. 12) and the motion to intervene (Clerk's Doc. No. 25) are **DISMISSED.**

All other requests for relief are denied.
A final judgment will be rendered by separate order.

SIGNED this 5th day of November, 2014.

/s/
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

/s/
CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE

/s/
MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION, FILED NOVEMBER 5, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CAUSE NO. A-14-CV-335-LY-CH-MS

SUE EVENWEL AND EDWARD PFENNINGER,

Plaintiffs,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, AND NANDITA BERRY, IN HER OFFICIAL CAPACITY AS TEXAS SECRETARY OF STATE,

Defendants.

FINAL JUDGMENT

Before the court is the above styled and numbered action. On this date by separate Order, the court dismissed Plaintiffs' claims with prejudice. As nothing remains in this action for the court to resolve, the court renders the following Final Judgment pursuant to Federal Rule of Civil Procedure 58.

IT IS ORDERED that Plaintiffs' claims are dismissed with prejudice and the action is hereby CLOSED.

SIGNED this 5th day of November, 2014.

/s/
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

/s/
CATHARINA HAYNES
UNITED STATES CIRCUIT JUDGE

/s/
MICHAEL H. SCHNEIDER
UNITED STATES DISTRICT JUDGE

APPENDIX D — COMPLAINT, FILED APRIL 21, 2014

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

Civil Action No. 1:14-cv-335

SUE EVENWEL; EDWARD PFENNINGER,

Plaintiffs,

v.

RICK PERRY, in his official capacity as Governor of Texas; NANDITA BERRY, in her official capacity as Texas Secretary of State,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiffs Sue Evenwel and Edward Pfenninger ("Plaintiffs") are qualified under Texas law to vote in the election of Texas State Senate members. Plaintiffs' votes in Texas State Senate elections will not be weighted equally with those of other qualified electors because of the malapportioned senatorial voting districts enacted by the Texas Legislature on June 23, 2013 and signed into law by Governor Rick Perry on June 26, 2013 ("Plan S172"). Plaintiffs bring this action for a declaration that Plan S172 is unconstitutional under the Fourteenth Amendment to the United States Constitution, and for an order enjoining

Texas from conducting further state Senate elections under Plan S172 and requiring the Texas Legislature to reapportion state senatorial voting districts in conformity with the Fourteenth Amendment.

BACKGROUND

2. The State of Texas recently adopted Plan S172 for the election of Members of the Texas Senate. Pursuant to Section 28, Article III of the Texas Constitution, the Texas Legislature initially re-apportioned the Texas Senate districts following the 2010 Federal Census. To "equally" apportion Texas's population in these Texas Senate districts, Texas sought to equalize total population with Senate districts and gave no consideration to the number of electors or potential electors within each district.

3. Members of the Texas Senate are elected to their posts by majority vote of registered voters actually casting ballots in a particular election. In districts where the number of electors is relatively low, the number of voters required to elect a Senate member is fewer than the number of voters required to elect a Senate member in districts where the number of electors is relatively high. Thus, the vote of an elector residing in a district where the number of electors is relatively high, like the districts in which Plaintiffs reside, is given significantly less weight than the votes of those in districts where the number of electors is relatively low.

4. Texas did not take into account the number of electors or potential electors in the proposed districts when crafting

Plan S172. There are, therefore, gross disparities in the number of electors between Texas Senate districts. For example, the votes of electors in Senate District 3, a district over-populated with electors, have only sixty-one percent (61%) of the weight of the votes of electors in Senate District 27, a district under-populated with electors. The gross disparities created by Plan S172 violate the fundamental requirement of voter equality under the Fourteenth Amendment.

5. By ignoring the discrepancies in the number of electors in each senatorial district, Plan S172 violates the "one person, one vote" principle of the Fourteenth Amendment to the United States Constitution. As the Supreme Court of the United States held in *Reynolds v. Sims*, the Fourteenth Amendment prohibits "weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside." By enacting, implementing, and enforcing Plan S172, the Defendants have run directly afoul of what the Supreme Court in *Reynolds* refers to as "the basic principle of representative government," specifically, that "the weight of a citizen's vote cannot be made to depend upon where he lives." Defendants have done so despite the fact that equalization of elector populations can be achieved compatibly with equalization of total population in properly apportioned senatorial districts.

THE PARTIES

6. Plaintiff Sue Evenwel is a citizen of the United States and of Texas and resides in Titus County, Texas. She

is a registered voter residing within the geographic boundaries of Senate District 1 under Plan S172. She regularly votes in Texas Senate elections, and plans to do so in the future.

7. Plaintiff Edward Pfenninger is a citizen of the United States and of Texas and resides in Montgomery County, Texas. He is a registered voter residing within the geographic boundaries of Senate District 4 under Plan S172. He regularly votes in Texas Senate elections, and plans to do so in the future.

8. Defendant Rick Perry is the duly elected Governor of Texas, and is the Chief Executive Officer of the State of Texas under Article IV, Section 1, of the Constitution of the State of Texas. Governor Perry signed Plan S172 into law on June 26, 2013, and is sued here in his official capacity.

9. Defendant Nandita Berry is the Secretary of State of the State of Texas, is an Executive Officer of the State of Texas under Article IV, Section 1, is appointed by the Governor of Texas by and with the advice of the Texas Senate under Article IV, Section 21, of the Constitution of the State of Texas, and is the Chief Election Officer for the State of Texas. Ms. Berry is responsible for implementing and enforcing Plan S172. She is sued here in her official capacity.

Appendix D

JURISDICTION AND VENUE

10. Plaintiffs' claims arise under the United States Constitution and federal law, and this Court has jurisdiction pursuant to 28 U.S.C. § 1331. Because Plaintiffs challenge the constitutionality of the apportionment of senatorial voting districts under Plan S172, this Court also has jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) and (4).

11. Venue is proper in this Court under 28 U.S.C. § 1391(b)(1) and (2) because all Defendants reside in Texas and each of the individual Defendants keeps his or her principal office in this district, and because a substantial part of the events or omissions giving rise to this complaint took place in this district.

REQUEST FOR THREE-JUDGE COURT

12. This action challenges the constitutionality of the apportionment of the Texas Senate, a statewide legislative body. Accordingly, "[a] district court of three judges shall be convened . . . ." 28 U.S.C. § 2284(a).

THE ONE-PERSON, ONE-VOTE PRINCIPLE

13. The Equal Protection Clause of the Fourteenth Amendment provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Relying on the Equal Protection Clause, the Supreme Court of the United States has held that "an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a

substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). This principle is referred to as "one person, one vote." *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

14. The one-person, one-vote principle requires equality of each qualified person's power to elect. The Supreme Court has held that, in accordance with this principle, it is permissible to apportion legislative districts based on the number of electors residing in those districts. *See Burns v. Richardson*, 384 U.S. 73 (1966). The Supreme Court has never held that the one-person, one-vote principle allows a state to apportion legislative districts on the basis of total population alone, while grossly underweighting certain electors' electoral power.

15. A panel of the United States Court of Appeals for the Fifth Circuit was previously faced with the question of whether the one-person, one-vote principle required the City of Houston to craft districts solely on the basis of citizen voting age population or another metric that would account for the number of electors, rather than the total population of the districts alone. *See Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). The court held that the decision to apportion on the basis of total population rather than voting population was a political question and that the courts should not interfere with the city's decision. The Fifth Circuit did not consider the question whether voting population could be ignored when it could be harmonized with total population.

Appendix D

REDISTRICTING THE TEXAS SENATE

16. The one-person, one-vote principle of the Equal Protection Clause requires that the States periodically revise their apportionment schemes in order to take into account population shifts and changes throughout the State. The Supreme Court has held that decennial reapportionment of state legislatures meets the minimal constitutional requirements for maintaining a reasonably current scheme of legislative representation. *See Reynolds*, 377 U.S. at 583-84.

17. Section 28, Article III of the Texas Constitution requires the Texas Legislature to reapportion the Texas Senate at its first regular session following the publication of the federal decennial Census.

18. In response to the 2010 Census, the Texas Legislature undertook a Texas Senate redistricting process beginning in June 2010.

19. Section 25, Article III of the Texas Constitution provides that "[t]he State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator." The Texas Constitution does not otherwise restrict districting by county, city, or other boundaries.

20. The Texas Constitution formerly included provisions requiring that "The State shall be divided into Senatorial Districts . . . according to the number of qualified electors, as nearly as may be . . . ." In 1981, however, Texas Attorney

General Mark White opined that these aspects of the Texas Constitution were "unconstitutional on [their] face as inconsistent with the federal constitutional standard." Att'y Gen. Op. No. MW-350 (1981). The opinion did not contain any analysis of the reason why those provisions were "inconsistent with" the federal Constitution. Those provisions of the Texas Constitution were repealed in 2001.

21. Consistent with Opinion No. MW-350, the Texas Legislature endeavored to re-draw the Texas Senate districts to equalize total population alone, and gave no consideration to also equalizing the number of electors in each Senate district.

22. It would have been possible for the Texas Legislature to adjust district boundaries so as to create 31 contiguous districts containing both relatively equal numbers of electors and relatively equal total population. *See* Exhibit A (Morrison Declaration). In other words, Texas could have safeguarded both the constitutional one-person, one-vote electoral principle and its interest in equally populated Senate districts but chose not to do so.

23. The Texas Legislature initially created Plan S148 as a redistricting plan for the Texas Senate. The Texas House passed H.B. 150, a bill containing Texas's congressional, state senate, and state house redistricting plans, including Plan S148, on April 28, 2011. The Texas Senate passed H.B. 150 on May 21, 2011, and Defendant Governor Rick Perry signed H.B. 150 into law on June 17, 2011.

24. All three redistricting plans included in H.B. 150, including Plan S148, were challenged in federal court. In particular, Plan S148 was challenged as violating Sections 2 and 5 of the Voting Rights Act. A three-judge court of the United States District Court for the Western District of Texas found that there was a "not insubstantial claim that" Senate District 10 in Plan S148 violated Section 5 of the VRA. *Davis v. Perry*, No. 5:11-cv-00788-OLG-JES-XR, ECF No. 147 (W.D. Tex. Mar. 9, 2012). That court created Plan S172 as an interim plan for the 2012 elections to remedy the perceived problem with Senate District 10 in Plan S148 and to adjust three contiguous districts. It otherwise sustained the enacted plan.

25. After the district court decreed Plan S172 as an interim plan for the 2012 elections, the Texas Senate and Texas House passed a bill making Plan S172 the State's legislatively enacted plan on June 14 and June 21, 2013, respectively. Governor Perry signed the bill on June 26, 2013. Plan S172 therefore superseded Plan S148.

PLAN S172 FAILS TO SECURE ONE-PERSON, ONE-VOTE RIGHTS TO PLAINTIFFS

26. Plan S172 creates Texas Senate districts that have large disparities in the number of electors amongst the districts. Tables created by the State setting forth the total population (from the 2010 Federal Census) and citizen voting age population ("CVAP") (from the three separate American Community Surveys ("ACS")) for each of the 31 districts of the Texas Senate are attached hereto as Exhibits B through D. A table created by the State

setting forth total voter registration and non-suspense voter registration for the 2008 and 2010 general elections is attached hereto as Exhibit E.

27. Many of the districts created by Plan S172 are severely over- or under-populated with electors relative to other districts in the State. The tables attached to this Complaint as Exhibits B through E reflect the fact that no consideration was given to the number of electors in the various districts: every conceivable measure of electors or potential electors demonstrates that Plan S172 distributes electors amongst the various districts in a remarkably unequal manner. Set out below are the variations from the ideal district using several different alternative metrics representing the number of electors or potential electors in Plan S172:

Appendix D

Metric	% Deviation From Ideal*
CVAP (2005-2009 ACS) (Exhibit B)	47.87%
CVAP (2006-2010 ACS) (Exhibit C)	46.77%
CVAP (2007-2011 ACS) (Exhibit D)	45.95%
Total Voter Registration (2010) (Exhibit E)	55.06%
Total Voter Registration (2008) (Exhibit E)	51.14%
Non-Suspense Voter Registration (2010) (Exhibit E)	53.66%
Non-Suspense Voter Registration (2008) (Exhibit E)	51.32%

28. Plaintiffs live in Senate districts that are among the districts most overpopulated with electors under Plan S172.

29. Plaintiff Evenwel resides in Senate District 1. The table below compares the number of electors (or potential electors) in Senate District 1 to the Senate District with the lowest number of electors (or potential electors) for that metric, expressed as a percentage deviation from the ideal district and as a ratio of relative voting strength:

---

* *Formula: number of electors in most-populated district minus number of electors in least-populated district, all divided by the average number of electors per district, expressed as a percentage of the average number of electors per district.*

Metric	Senate District 1	Low Senate District	Absolute Difference	% Deviation From Ideal	Voting Power
CVAP (2005-2009 ACS) (Exhibit B)	557,525	358,205	199,320	41.49%	1:1.56
CVAP (2006-2010 ACS) (Exhibit C)	568,780	367,345	201,435	40.88%	1:1.55
CVAP (2007-2011 ACS) (Exhibit D)	573,895	372,420	201,475	40.08%	1:1.54
Total Voter Registration (2010) (Exhibit E)	489,990	290,230	199,760	46.69%	1:1.69
Total Voter Registration (2008) (Exhibit E)	513,259	297,692	215,567	49.23%	1:1.72
Non-Suspense Voter Registration (2010) (Exhibit E)	425,248	252,087	173,161	47.23%	1:1.69
Non-Suspense Voter Registration (2008) (Exhibit E)	437,044	256,879	180,165	47.76%	1:1.84

Appendix D

30. Plaintiff Pfenninger resides in Senate District 4. The table below compares the number of electors (or potential electors) in Senate District 4 to the Senate District with the lowest number of electors (or potential electors) for that metric, expressed as a percentage deviation from the ideal district and as a ratio of relative voting power:

Appendix D

Metric	Senate District 4	Low Senate District	Absolute Difference	% Deviation From Ideal	Voting Power
CVAP (2005-2009 ACS) (Exhibit B)	506,235	358,205	148,030	30.81%	1:1.41
CVAP (2006-2010 ACS) (Exhibit C)	521,980	367,345	154,635	31.38%	1:1.42
CVAP (2007-2011 ACS) (Exhibit D)	533,010	372,420	160,590	31.95%	1:1.43
Total Voter Registration (2010) (Exhibit E)	466,066	290,230	175,836	41.10%	1:1.61
Total Voter Registration (2008) (Exhibit E)	468,949	297,692	171,257	39.11%	1:1.58
Non-Suspense Voter Registration (2010) (Exhibit E)	406,880	252,087	154,793	42.22%	1:1.61
Non-Suspense Voter Registration (2008) (Exhibit E)	409,923	256,879	153,044	40.57%	1:1.60

Appendix D

31. The effect of this severe overpopulation of electors is that the Plaintiffs' votes carry far less weight than the votes of other citizens in districts that are under-populated with electors.

32. The one-person, one-vote principle requires Texas to safeguard the right of electors like the Plaintiffs to an equally weighted vote in addition to equal representation based on total population.

33. The Supreme Court requires that States must "make a good-faith effort to achieve precise mathematical equality" in the apportionment of state voting districts. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). But the figures above confirm that Texas made no effort to ensure that the Plaintiffs' voting power was not substantially diluted when compared with votes of citizens living in other parts of the State.

34. Plaintiffs accept for purposes of decision that a jurisdiction might have a constitutional interest in creating legislative districts of roughly equal total population. But the Supreme Court's case law is clear that the Equal Protection Clause also protects the rights of *electors*, and that redistricting responsibility does not stop with total population equalization. States therefore must ensure that their apportionments protect the rights of electors, and they cannot apportion legislative districts based solely on total population where, as here, doing so would result in grossly unequal weighting of individual electoral power.

35. Plaintiffs recognize that the United States Court of Appeals for the Fifth Circuit held in *Chen v. City of Houston* that inequality of voting population among municipal legislative districts does not necessarily violate the one-person, one-vote principle because a jurisdiction can make a political decision to equalize total population rather than the number of electors. *Chen* did not consider whether electoral power could be ignored when it is possible to safeguard both interests. *Chen* also does not satisfy *Baker v. Carr* and *Reynolds v. Sims*, which not only protect electors' right to an equally weighted vote but also make justiciable legislative apportionment decisions that dilute the weight of votes. *Chen* is also distinguishable from the present case because the deviations amongst the districts in S172 with regard to the number of electors are greater than those that were presented in *Chen*. Finally, *Chen* is not binding on this Court because—as Texas recently recognized—only the Supreme Court has the authority to review the decisions of this three-judge court. *See* Plaintiff's Motion for Summary Judgment 38-40, ECF No. 347, *Texas v. Holder*, No. 12-cv-128 (D.D.C. Oct. 1, 2012) ("Texas contends that this three-judge district court is bound to follow only the precedent of the Supreme Court of the United States." (citing *United States v. Ramsey*, 353 F.2d 650, 658 (5th Cir. 1965))).

COUNT ONE – 42 U.S.C. § 1983

36. The allegations contained in paragraphs 1-37 above are re-alleged as if fully set forth herein.

37. The right to vote is fundamental, and is preservative of all other rights.

38. The Defendants are responsible for the passage, implementation, and enforcement of Plan S172.

39. Defendants violated the Equal Protection Clause of the Fourteenth Amendment by enacting, implementing, and enforcing Plan S172, which took no account of the rights of electors to an equally weighted vote and which weights the votes of Texas citizens differently based on where they live. As a result of Plan S172, the vote of electors living in certain areas of the State will be given significantly greater weight than the votes of Plaintiffs in state senatorial elections.

40. Plaintiffs' fundamental constitutional rights as electors to a vote of approximately equal weight to that of all other electors in the same state is impaired by Plan S172.

41. Texas could have apportioned its Senate districts to safeguard the principle of an equally weighted vote without departing from the goal of equalizing total population, but chose not to do so.

42. For these reasons, Plan S172 violates the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. § 1983.

43. Plaintiffs have no adequate remedy at law other than the judicial relief sought herein. Unless the Defendants are enjoined from enforcing Plan S172 and ordered to draw a new plan that complies with the Constitution, Plaintiffs will be irreparably harmed by the continued violation of their constitutional rights.

Appendix D

RELIEF SOUGHT

WHEREFORE, Plaintiffs hereby request that this Court award the following relief:

(a) Issue a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, which declares (i) that Texas was required to account for electors' right to an equally weighted vote; and (ii) that Texas's failure to do so under the circumstances violated Plaintiffs' rights under the Fourteenth Amendment to the United States Constitution;

(b) Permanently enjoin Defendants from calling, holding, supervising, or certifying any elections under Plan S172;

(c) Enter an order requiring Texas to establish constitutionally valid state senatorial districts prior to the next scheduled state senatorial election;

(d) Award Plaintiffs all reasonable fees and costs incurred herein under 42 U.S.C. §§ 1973*l*(e) and 1988(b) and (c); and

(e) Grant any and all further relief to which Plaintiffs shall be entitled.

Appendix D

DATED: April 21, 2014

Respectfully submitted,

/s/_____

Meredith B. Parenti
Texas Bar No. 00797202
PARENTI LAW PLLC
P.O. Box 19152
Houston, TX 77224
Tel.: (281) 224-5848
Fax: (281) 605-5677
meredith@parentilaw.com

Bert W. Rein
William S. Consovoy
Brendan J. Morrissey
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
Tel.: (202) 719-7000
Fax: (202) 719-7049

ATTORNEYS FOR PLAINTIFFS

No. 14-940

In the Supreme Court of the United States

SUE EVENWEL, EDWARD PFENNINGER,
Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF TEXAS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO DISMISS OR AFFIRM

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@texasattorneygeneral.gov
(512) 936-1700

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

APRIL L. FARRIS
Assistant Solicitor General

QUESTION PRESENTED

Whether the three-judge district court correctly held that the "one-person, one-vote" principle under the Equal Protection Clause allows States to use *total* population, and does not require States to use *voter* population, when apportioning state legislative districts.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Opinion Below 1

Jurisdiction 1

Statement 2

Argument 5

I. This Appeal Does Not Present an Unsettled Substantial Question. 6

II. The District Court Correctly Dismissed Plaintiffs' Suit for Failure to State a Claim. 11

A. The Equal Protection Clause Does Not Compel the States to Rely Upon a Particular Apportionment Base. 12

B. Plaintiffs Did Not State a Prima Facie Claim Under the Equal Protection Clause. 20

III. The District Court Did Not Invoke the Political-Question Doctrine. 22

Conclusion 23

TABLE OF AUTHORITIES

Page

Cases

Brown v. Thomson,
462 U.S. 835 (1983) 4, 20

Burns v. Richardson,
384 U.S. 73 (1966) ..... *passim*

Chen v. City of Houston,
121 S. Ct. 2020 (2001) 6, 9

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2000) ..... *passim*

Daly v. Hunt,
93 F.3d 1212 (4th Cir. 1996) 10, 16, 17, 21

Davis v. Abbott,
___ F.3d ___, No. 14-50042, 2015 WL 1219268,
(5th Cir. Mar. 17, 2015) 2

Gaffney v. Cummings,
412 U.S. 735 (1978) ..... *passim*

Garza v. Cnty. of L.A.,
918 F.2d 763 (9th Cir. 1990) ..... *passim*

Hadley v. Junior College Dist. of Metro. Kansas City, 397 U.S. 50 (1970) 16, 17

Lepak v. City of Irving,
453 F App'x. 522 (5th Cir. 2011)
(per curiam) 9, 10

Mahan v. Howell,
410 U.S. 315 (1973) 14

Nixon v. United States,
506 U.S. 224 (1993) 2

Reynolds v. Sims,
377 U.S. 533 (1964) ..... *passim*

Zivotofsky ex. rel. Zivotofsky v. Clinton,
132 S. Ct. 1421 (2012) 22

Constitutional Provisions

TEX. CONST. art. III, § 25 2

TEX. CONST. art. III, § 28 2

U.S. CONST. amend. XIV, § 2 19

Statutes

28 U.S.C. § 2284(a) 3

28 U.S.C. § 1253 2

Other Authorities

Act of June 21, 2013, 83d Leg., 1st C.S., ch. 1,
2013 Tex. Sess. Law Serv. 4677 2

Act of May 21, 2011, 82d Leg., R.S., ch.1315, 2011 Tex. Sess. Law Serv. 3748.....2

M. Davis, *Assessing the Constitutionality of Adjusting Prisoner Census Data in Congressional Redistricting: Maryland's Test Case*, 43 U. Balt. L. Forum 35 (2012).....10

Fed. R. Civ. P. 12(b)(6) .....*passim*

J. Fishkin, *Weightless Votes*, 121 Yale L.J. 1888 (2012).....9

Nat'l Conf. of State Legislatures, Redistricting Law 2010 (2009).....10

Joseph T. Sneed III, Footprints on the Rocks of the Mountain: An Account of the Fourteenth Amendment (1997).....18, 19

In the Supreme Court of the United States

No. 14-940

SUE EVENWEL, EDWARD PFENNINGER,
Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF TEXAS, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO DISMISS OR AFFIRM

OPINION BELOW

The three-judge district court's decision (J.S. App. 3a–14a) is not yet published in the Federal Supplement.

JURISDICTION

The district court entered judgment on November 5, 2014. A notice of appeal was filed on December 4, 2014. Although this Court would normally have jurisdiction to review a three-judge district court's dismissal under Federal Rule of Civil Procedure

12(b)(6), 28 U.S.C. § 1253, the Court lacks subject-matter jurisdiction in this case under the political-question doctrine. *Nixon v. United States*, 506 U.S. 224 (1993).

STATEMENT

1. The Texas Constitution requires the Texas Legislature to reapportion its Senate districts during the first regular legislative session following the federal decennial census. TEX. CONST. art. III, § 28. The Texas Constitution restricts that apportionment only by requiring that "[t]he State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator." *Id.* art. III, § 25.

Following the 2010 census, the Texas Legislature passed a Senate reapportionment plan known as Plan S148. *See* Act of May 21, 2011, 82d Leg., R.S., ch. 1315, 2011 Tex. Sess. Law Serv. 3748. Federal Voting Rights Act litigation immediately commenced. A three-judge district court enjoined Plan S148, which had not been precleared under VRA § 5, and issued an interim plan known as Plan S172 for the 2012 primary elections. *See Davis v. Abbott*, ___ F.3d ___, No. 14-50042, 2015 WL 1219268, at *2–3 (5th Cir. Mar. 17, 2015). In 2013, the Texas Legislature adopted Plan S172 and repealed Plan S148. *See* Act of June 21, 2013, 83d Leg., 1st C.S., ch. 1, 2013 Tex. Sess. Law Serv. 4889.

2. Plaintiff-Appellant Sue Evenwel lives in Titus County, Texas, which is in Texas Senate District 1.

Plaintiff-Appellant Edward Pfenninger lives in Montgomery County, Texas, which is in Senate District 4. In 2014, plaintiffs sued the Texas Governor and Secretary of State in their official capacities, asserting that Plan S172's apportionment violates the Equal Protection Clause. Because plaintiffs brought a constitutional challenge to the apportionment of a statewide legislative body, the Chief Judge of the Fifth Circuit convened a three-judge district court. *See* 28 U.S.C. § 2284(a).

Plaintiffs alleged that Plan S172 violates the "one-person, one-vote" principle of the Equal Protection Clause by apportioning Texas Senate districts based on total population, so that each district contains a substantially equal number of individuals, without accounting for "the number of electors or potential electors." J.S. App. 18a. Plaintiffs conceded that Plan S172's total deviation from perfectly equal population across districts, using total population, is 8.04%. J.S. App. 5a. They alleged, however, that the districts vary to a larger degree in voter population. *Id.* Plaintiffs sought a judgment declaring that Plan S172 violates the Equal Protection Clause, enjoining the State from using Plan S172 to conduct any election, and an order requiring the Texas Legislature to reapportion the State's Senate districts. J.S. App. 34a.

Defendants moved to dismiss for failure to state a claim upon which relief can be granted, Fed. R. Civ. P 12(b)(6), arguing that the Equal Protection Clause does not compel the State to use voter population

rather than total population or a combination of the two.

3. The three-judge district court granted defendants' Rule 12(b)(6) motion to dismiss. J.S. App. 4a. The court's opinion noted that "the Supreme Court has generally used total population as the metric of comparison." J.S. App. 7a (citing *Brown v. Thomson*, 462 U.S. 835, 837–40 (1983); *Gaffney v. Cummings*, 412 U.S. 735, 745–50 (1973); *Reynolds v. Sims*, 377 U.S. 533, 568–69 (1964)). The district court acknowledged that plaintiffs are "relying upon a theory never before accepted by the Supreme Court or any circuit court: that the metric of apportionment employed by Texas (total population) results in an unconstitutional apportionment because it does not achieve equality as measured by Plaintiffs' chosen metric—voter population." J.S. App. 9a.

The court rejected plaintiffs' assertion that their theory "is consonant with *Burns* [*v. Richardson*, 384 U.S. 73 (1966)]." J.S. App. 10a. The district court explained that *Burns*, in considering a Hawaii apportionment plan, "stated that a state's choice of apportionment base is not restrained beyond the requirement that it not involve an unconstitutional inclusion or exclusion of a protected group." *Id.* This "amount of flexibility is left to state legislatures" because a decision about apportionment base "*involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.*" J.S. App. 11a (quoting *Burns*, 384 U.S. at 92) (emphasis added by district

court). The district court therefore "conclude[d] that Plaintiffs are asking us to 'interfere' with a choice that the Supreme Court has unambiguously left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." J.S. App. 13a.

The three-judge district court then dismissed plaintiffs' lawsuit for failure to state a claim under Rule 12(b)(6), as plaintiffs admitted that Plan S172's "total deviation from ideal, using total population, is 8.04"—which "falls below 10%," the deviation necessary to make out a prima facie case. J.S. App. 8a (citing *Brown*, 462 U.S. at 842–43). The district court did not address subject-matter jurisdiction under the political-question doctrine. Plaintiffs appealed.

ARGUMENT

The district court correctly dismissed plaintiffs' lawsuit for failure to state a claim. This appeal should be dismissed for lack of an unsettled substantial federal question, or the judgment should be summarily affirmed. Plaintiffs cite no case in which a court has accepted their claim that the Constitution compels States to apportion their legislative districts based on voter population, as opposed to or in addition to total population. And multiple precedents from this Court confirm that total population is a permissible apportionment base under the Equal Protection Clause. Nothing in this case warrants a different result.

The district court did not address the political-question doctrine, as it dismissed the lawsuit under Rule 12(b)(6) for failure to state a claim. Summary disposition therefore would say nothing about the political-question doctrine. In all events, the political-question doctrine presents an additional hurdle for plaintiffs.

I. THIS APPEAL DOES NOT PRESENT AN UNSETTLED SUBSTANTIAL QUESTION.

Plaintiffs urge this Court to grant briefing and argument to determine "what measure of population should be used for determining whether the population is equally distributed among the districts." J.S. 12–13 (quoting *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001) (Thomas, J., dissenting from the denial of certiorari)). Plaintiffs presume that the Equal Protection Clause requires States to apportion their legislative districts based on a particular measure of population. But this Court has recognized that States have a *choice* among multiple apportionment bases; it follows that the Equal Protection Clause does not mandate any particular apportionment base. There is no unsettled question for this Court to consider.

A. In 1964, the Court interpreted the Equal Protection Clause to require that "both houses of a bicameral state legislature . . . be apportioned [substantially] on a population basis." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). It cautioned, however, that reapportionment remains primarily a matter for the States to resolve through "legislative

consideration and determination," and judicial relief is appropriate only when States fail to heed constitutional constraints. *Id.* at 586.

Two years later, *Burns v. Richardson*, 384 U.S. 73 (1966), considered a challenge to a Hawaii apportionment plan designed to create districts with a substantially equal number of registered voters. The challengers argued that the Equal Protection Clause instead compelled Hawaii to apportion using total population, which was the population base at issue in *Reynolds*. *Burns*, 384 U.S. at 90. Even though a substantial disparity persisted between the districts when measured using total population, the Court refused to constrain Hawaii to any single measure of population. *Id.* *Burns* reasoned:

> [T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in [*Reynolds*] and most of the others decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population. . . *The decision to include or exclude any such [non-*

> *voter population] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.* Unless a choice is one the Constitution forbids, the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby.

Id. at 91–92 (internal citations omitted) (emphasis added).

Read in context, *Burns* demonstrates that the Court "left open" the question of how to define "population" not for the Court to decide at some future point, but for the state legislatures to decide by choosing among multiple constitutional measures of population. *Id.* at 91. Were this not so, then there would be no "choice" for state legislatures to make. *Id.* at 92. Thus, *Burns* emphasized that although a State may not choose an unconstitutional population measure, "a State's *freedom of choice* to devise substitutes for an apportionment plan found unconstitutional either as a whole or in part, should not be restricted beyond the clear commands of the Equal Protection Clause." *Burns*, 384 U.S. at 85 (emphasis added).

Furthermore, this Court has never interpreted *Burns* to suggest that only one measure of population passes constitutional muster. Although Justice Thomas would have granted certiorari on the question of "what measure of population should be used" to

determine whether the population is equally apportioned, he recognized that the Court could "decide that each jurisdiction can choose its own measure of population." *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from the denial of certiorari).

B. The Court has denied certiorari in multiple cases rejecting plaintiffs' argument that voter population must be substantially equalized. *Lepak v. City of Irving*, 453 F. App'x. 522 (5th Cir. 2011) (per curiam), *cert. denied*, 133 S. Ct. 1725 (2013); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 2020 (2001); *Garza v. Cnty. of L.A.*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

Although these certiorari denials do not connote approval of the underlying decisions, it is unlikely that *Burns* required States to achieve substantial population equality under a single measure of population without identifying that single measure. The better reading of *Burns* is that multiple population measures may satisfy the Equal Protection Clause, and courts will not force a "better" option on a State if its chosen apportionment base is not otherwise prohibited by the Constitution. *See Burns*, 384 U.S. at 89; J.S. App. 11a. In fact, as a practical matter, most apportionment plans use total population and not voter population. *See, e.g.*, J. Fishkin, *Weightless Votes*, 121 Yale L.J. 1888, 1890 (2012) ("Today, line-drawers across the nation rely almost uniformly on total population . . ."); M. Davis, *Assessing the Constitutionality of Adjusting Prisoner*

Census Data in Congressional Redistricting: Maryland's Test Case, 43 U. Balt. L. Forum 35, 41 (2012) ("most jurisdictions use total population as the base" (citing Nat'l Conf. of State Legislatures, Redistricting Law 2010, 11 (2009))). This appeal thus presents no issue for the Court to "settle." J.S. 13, 16.

Indeed, there is no split of authority to resolve. Three circuits have considered and rejected the argument that apportionment by total population violates the Constitution because it does not achieve equality of voter population. *See Chen*, 206 F.3d at 522 (Fifth Circuit rejecting argument that City of Houston violated Equal Protection Clause by "improperly craft[ing] its districts to equalize total population rather than citizen voting age population"); *Daly v. Hunt*, 93 F.3d 1212, 1222 (4th Cir. 1996) (rejecting argument that "voting-age population is the more appropriate apportionment base because it provides a better indication of actual voting strength than does total population"); *Garza*, 918 F.2d at 773–74 (Ninth Circuit rejecting argument that decision to "employ[] statistics based upon the total population of the County, rather than the voting population, . . . is erroneous as a matter of law"); *see also Lepak*, 453 F. App'x at 523 (relying on *Chen* to reject argument that Equal Protection Clause requires equalizing districts based on voter population rather than total population).

Plaintiffs' case for plenary review rests significantly on Judge Kozinski's separate opinion in *Garza*. 918 F.2d at 782 (Kozinski, J., concurring in

part and dissenting in part). Judge Kozinski disagreed with the Ninth Circuit's holding that the Equal Protection Clause required Los Angeles County to apportion based on total population and prevented apportioning based on voter population. *Id.* at 779–82. He concluded that the Equal Protection Clause required apportionment based on potential voter population as opposed to total population where the two measures were in conflict, although he acknowledged statements by this Court suggesting otherwise. *See id.* at 782–85.

In the nearly twenty-five years since *Garza*, no court of appeals has adopted Judge Kozinski's position. Although other circuits have expressly considered his reasoning, it has never carried the day in those courts or garnered a dissent on the merits. *See, e.g., Chen*, 206 F.3d at 526 (finding Judge Kozinski's position irreconcilable with *Burns*).

II. THE DISTRICT COURT CORRECTLY DISMISSED PLAINTIFFS' SUIT FOR FAILURE TO STATE A CLAIM.

The Court can summarily affirm because the district court's opinion correctly applied this Court's equal-protection framework. *Gaffney v. Cummings* establishes that parties may prove that a State's congressional apportionment plan violates the Equal Protection Clause in either of two ways. 412 U.S. 735, 744 (1978); J.S. App. 6a. They may show that the plan (1) fails to achieve substantial equality of population among districts using a permissible population base, *see Gaffney*, 412 U.S. at 744; or (2) actually discriminates against a protected group, *id.* at 751–

52; J.S. App. 6a–7a. Plaintiffs do not dispute the district court's conclusion that they failed to "plausibly" allege a claim under the second theory. J.S. App. 7a n.3. Accordingly, they were required to state a claim under the first theory, which enforces the Equal Protection Clause's "one-person, one-vote" principle. J.S. App. 7a.

The district court correctly concluded that plaintiffs failed to state a claim upon which relief could be granted. Specifically, the district court held that (1) the Equal Protection Clause does not restrict States to a single apportionment base; (2) plaintiffs' preferred apportionment base is not constitutionally mandated; and (3) the apportionment base used by Texas is not constitutionally prohibited. Plaintiffs therefore were required to establish a prima facie case of failure to achieve substantial equality of total population, and they did not.

A. The Equal Protection Clause Does Not Compel the States to Rely Upon a Particular Apportionment Base.

Plaintiffs' cause of action turns upon whether the Equal Protection Clause compels the States to achieve substantial equality on a particular measure of population. If it does not, then a State's choice of a particular measure, or a combination of permissible measures, is simply a policy choice left to the legislative process.

The district court recognized that *Burns* already decided—in the negative—the question whether the

Constitution compels States to use a particular apportionment base. This case presents no reason to reevaluate *Burns*'s holding, which is consistent with both the historical context of the Fourteenth Amendment's ratification and this Court's reapportionment jurisprudence.

1. The district court correctly held that plaintiffs' Equal Protection Clause theory "is contrary to the reasoning of *Burns* and has never gained acceptance in the law." J.S. App. 14a.

The parties agree that the Equal Protection Clause requires that representatives be elected from districts of relatively equal population. Since *Reynolds*, States have apportioned based on total population or voter population, often with the "happy coincidence that eligible voters will frequently track the total population evenly." *Chen*, 206 F.3d at 525. As the Fifth Circuit recognized in *Chen*, the choice may present a "stark" contrast where "potentially eligible voters are unevenly distributed." *Id.*

Plaintiffs urged the district court to adopt Judge Kozinski's view that certain language from this Court's opinions mandates protection of the individual voter, meaning that any conflict between electoral equality and representational equality must be resolved in favor of the former. *See Garza*, 918 F.2d at 782–83 (Kozinski, J., concurring in part and dissenting in part). Judge Kozinski reasoned that "[r]eferences to the personal nature of the right to vote . . . on which the one person one vote principle is founded appear in the case law with monotonous

regularity." *Id.* at 782. And plaintiffs identify references to electoral equality in *Reynolds* and its progeny. *See, e.g., Reynolds*, 377 U.S. at 565–66 ("Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators."); *id.* at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen. . [T]he basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives."); *Gaffney*, 412 U.S. at 746 (noting that "if it is the weight of a person's vote that matters, total population . . may not actually reflect that body of voters").

But that is only part of the story. "[A]s Judge Kozinski admits . . . other language can be found that implies that representational equality is the ideal." *Chen*, 206 F.3d at 525; *see Daly*, 93 F.3d at 1223; *see also Gaffney*, 412 U.S. at 742 (requiring that electoral districts must be "as nearly of equal population as is practicable" (quoting *Reynolds*, 377 U.S. at 577)); *Mahan v. Howell*, 410 U.S. 315, 321 (1973) (reasoning that "the basic constitutional principle [is] equality of population among the districts"), *modified*, 411 U.S. 922 (1973). The language and "tradition" supporting the principle of representational equality even caused Judge Kozinski to admit he would "not be surprised to see [this Court] limit or abandon the principle of

electoral equality in favor of a principle of representational equality." *Garza*, 918 F.2d at 785 (Kozinski, J., concurring in part and dissenting in part).

The Fourth and Fifth Circuits both refused to give controlling significance to statements that plaintiffs read as mandating equality in voter population. *Chen*, 206 F.3d at 526; *Daly*, 93 F.3d at 1223–24. *Chen* reasoned that the statements appearing to favor electoral equality generally refer to "situations in which total population was presumptively an acceptable proxy for potentially eligible voters," so it would not be unexpected for the terms to be "used interchangeably, with perhaps a slight bias toward the more historically resonant phrase—unquestionably, one-person, one-vote." *Chen*, 206 F.3d at 525–26.

This interchangeable usage of terminology explains why passages that plaintiffs highlight, particularly in *Reynolds*, are often "contradicted by statements within the same opinion." *Id.* (citing *Reynolds*, 377 U.S. at 568 ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats . must be apportioned on a population basis.")).

Rather than attempting to parse the terminology, the district court correctly went straight to *Burns*—the case that controls the question whether the Constitution compels the use of a particular apportionment base. J.S. App. 10a; *see Chen*, 206 F.3d at 526–27 (finding *Burns* to be dispositive); *Daly*, 93

F.3d at 1224–25 (same). Unlike *Reynolds*, *Burns* "directly confronted an actual differential between the concepts" of electoral equality and representational equality. *Chen*, 206 F.3d at 526. Hawaii had achieved substantial equality in registered-voter population, but there were "large disparities between districts when measured using total population." J.S. App. 10a (quoting *Burns*, 384 U.S. at 90).

The district court correctly refused to interpret *Burns* as "making clear that the right of voters to an equally weighted vote" is not simply *a* relevant, but "*the* relevant constitutional principle." J.S. App. 13a (emphasis added); *see Chen*, 206 F.3d at 526; *Daly*, 93 F.3d at 1224–25. "Quite the contrary," the district court explained, *Burns* "recognized that the precise question presented here—whether to 'include or exclude' groups of individuals ineligible to vote from an apportionment base—'involves choices about the nature of representation' which the Court has 'been shown no constitutionally founded reason to interfere.'" J.S. App. 13a (quoting *Burns*, 384 U.S. at 92). In other words, the Supreme Court in *Burns* refused to force States to require either voter population or total population because neither measure offended the Equal Protection Clause.

This reading of *Burns* finds support in *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970). *Hadley* simply noted that "[t]here is some question in this case whether school enumeration figures, rather than actual population figures, *can* be used as a basis of apportionment."

Hadley, 397 U.S. at 57 n.9 (citing *Burns*, 384 U.S. at 90–95) (emphasis added). *Hadley* found "no need to decide" the question because "even if school enumeration [was] a permissible basis," the statute at issue "fail[ed] to apportion trustees constitutionally." *Id.* But *Hadley*'s use of the word "can" indicates that States have a choice among multiple apportionment bases, and the question was simply whether the chosen base was among the permissible choices. *Hadley* does not read *Burns* to suggest that there is a single constitutionally compelled apportionment base.

Burns leaves no doubt that the district court correctly "decline[d] [plaintiffs'] invitation" to choose the population base that Texas should use to apportion its Senate districts. J.S. App. 13a. That choice is one of policy, not constitutional imperative, because the apportionment base that Texas has chosen is not constitutionally prohibited. *See id.*; *Chen*, 206 F.3d at 526–27 ("Judge Kozinski argues that *Burns* should be determinative for electoral equality, since there the Court allowed a plan that used an even more nuanced measure of voting strength—registered voters. But we are reluctant to read *Burns*' allowance of such a measure into a command in the face of what appears to us to be a clear statement to the contrary . . . ."); *Daly*, 93 F.3d at 1225 (holding that the "permissive language [in *Burns*] implies that the decision to use an apportionment base other than total population is up to the state").

2. There is no reason to reexamine *Burns*. It is consistent with the historical context of the Fourteenth Amendment's framing and with the principles of federalism that animate this Court's apportionment cases.

Burns's recognition that the Fourteenth Amendment does not mandate the use of a particular apportionment base accords with the Amendment's history. *Chen*, 206 F.3d at 527–28. The Fifth Circuit analyzed that history in *Chen*, and concluded that the "proponents of the Fourteenth Amendment had a meaningful debate on the question" of which population measure should be used in apportionment, but that the debate "cannot be said to have been definitively resolved." *Id.* at 527.

Two historical facts recounted in *Chen* cast doubt on the notion that the Equal Protection Clause requires States to adopt a voter-population metric. First, the "drafters of the Fourteenth Amendment, on which *Reynolds* itself rests, do appear to have debated th[e] question, and rejected a proposal rooted in—among other things—the principle of electoral equality." *Id.* A proposed constitutional amendment introduced in December 1865 would have "apportioned congressional representation among the states 'according to their respective legal voters, and for this purpose none shall be named as legal voters who are not either natural born citizens or natural foreigners.'" *Id.* (quoting Joseph T. Sneed III, Footprints on the Rocks of the Mountain: An Account

of the Fourteenth Amendment 35 (1997)). That proposal was not adopted.

Second, the "[d]ebates over the precise basis for apportionment of Congress proved a contentious issue throughout the process that led to the creation of section 2 of the [Fourteenth] Amendment." *Id.* In their "debate over whether to base apportionment on potential voters, citizens, or population," the framers recognized "that aliens were unevenly distributed throughout the country," and that the western States contained an "overabundance of males." *Id.* Thus, northern States opposed using citizenship as a benchmark due to their large alien populations, and New England opposed proposals to use "eligible voters rather than total population" due to the "relative preponderance of women in those States." *See id.* at 527 n.18 (citing Sneed, *supra*, at 103–04, 145).

The drafters did not conclusively settle this debate. *Id.* at 527. The final version of Section 2 instead provides "generally for the use of total population figures for purposes of allocating the House of Representatives among the states" while also including a "mechanism to insure that egregious departures from the principle of *electoral* equality—the disenfranchisement of adult male 'citizens'—would be penalized." *Id.* (discussing U.S. CONST. amend. XIV, § 2). In light of this history, *Chen* expressed "some difficulty in reading the Equal Protection Clause to require the adoption of a particular theory of political equality." *Id.*

This Court's forbearance to "settle" this debate in *Burns* respects the historical context. The drafters of the Fourteenth Amendment debated the representational and electoral theories of political equality, but the Fourteenth Amendment does not endorse either theory as a constitutional mandate.

B. Plaintiffs Did Not State a Prima Facie Claim Under the Equal Protection Clause.

The district court correctly dismissed plaintiffs' suit, because Texas was not required to achieve relative equality of apportionment using a voter-population measure, either alone or in conjunction with a total-population measure. J.S. App. 7a.

Plaintiffs do not dispute that they challenged Texas's apportionment plan on the ground that "the plan does not achieve substantial equality of population among districts when measured using a permissible population base." J.S. App. 6a (citing *Gaffney*, 412 U.S. at 744). Thus, they were required to show that the plan failed to achieve "substantial equality of population." *Reynolds*, 377 U.S. at 579; *see id.* at 577 ("The Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."). Nor do plaintiffs deny that minor deviations, defined as "a maximum population deviation under 10%," fail to make out a prima facie case under this theory. *Brown*, 462 U.S. at 842.

Plan S172 does not deviate impermissibly from the ideal population when measured by the total-population apportionment base chosen by Texas. J.S. App. 8a; *see Chen*, 206 F.3d at 523. Plaintiffs "admit that Texas redrew its senate districts to equalize total population, and they present facts showing that PLANS172's total deviation from ideal, using total population, is 8.04%." J.S. App. 8a. Thus, "Plaintiffs' own pleading shows that they cannot make out a prima facie case of a violation of the one-person, one-vote principle." *Id.*

The district court correctly rebuffed plaintiffs' attempt to distinguish *Chen* on the ground that plaintiffs "do not ask the court to decide on behalf of the legislature which source of equality—electoral or representational—is supreme," but instead ask the court to rule that "substantial equality of population on both fronts is a constitutionally required choice where both can be achieved." J.S. App. 10a n.4.

This is a "distinction without meaning." *Id.* Plaintiffs still invite the Court "to find PLANS172 unconstitutional based on Plaintiffs' chosen apportionment base, even though the state employed a permissible apportionment base and achieved substantial equality of population doing so." *Id.* But the "possibility of drafting a 'better' plan" does not suffice to "establish a violation of the one-person, one vote principle." *Daly*, 93 F.3d at 1221 (citing *Gaffney*, 412 U.S. at 740–41). Accordingly, plaintiffs have not stated a claim under the Equal Protection Clause, and their suit was properly dismissed.

III. THE DISTRICT COURT DID NOT INVOKE THE POLITICAL-QUESTION DOCTRINE.

Summary disposition would say nothing about the political-question doctrine. The district court did not address it in dismissing under Rule 12(b)(6) for failure to state a claim. J.S. App. 14a.

The political-question doctrine nevertheless presents another hurdle for plaintiffs. The doctrine is a "narrow exception" to the rule that the "Judiciary has a responsibility to decide cases properly before it." *Zivotofsky ex. rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012). The doctrine applies "where there is a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.* (citation and internal quotation marks omitted).

The Court has already recognized that while the Judiciary does have a responsibility to decide many apportionment cases, this implicates a task primarily left to the legislative process: "From the very outset, we recognized that the apportionment task, dealing as it must with fundamental 'choices about the nature of representation,' is primarily a political and legislative process." *Gaffney*, 412 U.S. at 749 (quoting *Burns*, 384 U.S. at 92). And here, the particular decision to select an apportionment base on the basis of electoral equality or representational equality is even closer to the core of this legislative apportionment power than the decisions in previous apportionment cases decided by the Court. *See Chen*, 206 F.3d at 528 ("this

eminently political question has been left to the political process"); *Daly*, 93 F.3d at 1227 ("This is quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment."). The political-question doctrine therefore presents an additional basis for dismissing plaintiffs' lawsuit, even though the district court did not address this doctrine.

CONCLUSION

The appeal should be dismissed, or the judgment of the district court should be affirmed.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@texasattorneygeneral.gov
(512) 936-1700

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

APRIL L. FARRIS
Assistant Solicitor General

April 2015

No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

OPPOSITION TO MOTION TO DISMISS OR AFFIRM

BRENDAN J. MORRISSEY
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006

MEREDITH B. PARENTI
PARENTI LAW PLLC
7500 San Felipe, Suite 600
Houston, Texas 77063

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PLLC
3033 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
(703) 243-9423
will@consovoymccarthy.com

Counsel for Appellants

April 20, 2015

258909

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES ii

INTRODUCTION 1

I. Texas's Arguments For Why This Appeal Does Not Present A "Substantial" Question All Miss The Mark 1

II. Texas Does Not Deny The Importance Of This Constitutional Question And Offers Almost No Defense On The Merits 7

III. Texas Agrees This Appeal Is The Ideal Vehicle For Deciding The Question Presented 11

CONCLUSION 12

TABLE OF CITED AUTHORITIES

Page

CASES

Alabama Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015).....6

Baker v. Carr,
396 U.S. 186 (1962).....10

Board of Estimate of City of New York v. Morris,
489 U.S. 688 (1989).....6-7

Brown v. Thomson,
462 U.S. 835 (1983).....7

Burns v. Richardson,
384 U.S. 73 (1966)..... *passim*

Calvin v. Jefferson County Bd. of Comm'rs,
No. 4:15-cv-00131-MW-CAS
(N.D. Fla. Mar. 9, 2015).....8

Chen v. City of Houston,
121 S. Ct. 2020 (2001).....5, 9

Chen v. City of Houston,
206 F.2d 502 (5th Cir. 2000) 5, 10

Connor v. Finch,
431 U.S. 407 (1977).....9

Cited Authorities

Page

Daly v. Hunt,
93 F.3d 1212 (4th Cir. 1996).....5, 10

Davis v. Bandemer,
478 U.S. 109 (1986).....10

Gaffney v. Cummings,
412 U.S. 735 (1973).....9, 10

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1991).....5

Gray v. Sanders,
372 U.S. 368 (1963).....7

Hadley v. Junior College District of Metropolitan Kansas City,
397 U.S. 50 (1970).....4

Karcher v. Daggett,
462 U.S. 725 (1983).....7

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006).....6

Montes v. City of Yakima,
420 F. Supp. 1377 (E.D. Wash. 2014).....8

Reynolds v. Sims,
377 U.S. 533 (1964).....7, 9, 10

INTRODUCTION

Appellants' Jurisdictional Statement ("Statement") explained that the decision below would allow the Texas Legislature to adopt "a Senate map containing 31 districts of equal total population without violating the one-person, one-vote principle—even if 30 of the districts each contained one voter and the 31st district contained all other voters in the State." Statement 3. While Appellees ("Texas") would not directly respond to this hypothetical, the Motion to Dismiss or Affirm ("Motion") makes plain that Texas believes such a plan would survive review under the Equal Protection Clause. The constitutionality of that radical proposition clearly is a substantial federal question. The Court should note probable jurisdiction and set the case for oral argument.

I. Texas's Arguments For Why This Appeal Does Not Present A "Substantial" Question All Miss The Mark.

There is no doubt the issue this appeal raises — whether a state must apportion its legislature in a way that protects the right of voters to an equal vote — is a substantial question. That is the only issue before the Court at this stage of the proceedings. Thus, the Court should grant plenary review. Statement 12-16.

Texas does not actually disagree. Rather, Texas argues that *Burns v. Richardson*, 384 U.S. 73 (1966), already decided the concededly substantial question that otherwise would need resolution here. Motion 6-9. According to Texas, *Burns* holds that "the Equal Protection Clause does not mandate any particular

apportionment base" and thus does not protect voters from having their votes debased through apportionment. *Id.* 6. As a result, Texas argues, "[t]here is no unsettled question for this Court to consider." *Id.* That is incorrect for several reasons.

Factually, *Burns* could not have decided that the one-person, one-vote principle fails to protect voters from having their votes debased because the Hawaii plan at issue *did* protect voters. Statement 23-24. Like Texas, Hawaii's population included a large and unevenly distributed number of non-voters. *Burns*, 384 U.S. at 80-81. Unlike Texas, however, Hawaii resolved the issue in favor of voter equality, using registered voters as its apportionment base. *Id.* The Court sustained Hawaii's decision against an equal-protection challenge. "Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured." *Id.* at 92. In fact, including them would have been "'grossly absurd and disastrous.'" *Id.* at 94 (citations omitted). *Burns* held that apportionment based on total population is not required when doing so would undermine the rights of voters. But *Burns* did not decide the question here: whether a State may exclusively apportion based on total population when it *does* undermine voter equality.

Given the differences between the two cases, Texas is forced to bank its argument on two sentences from the opinion: "The decision to include or exclude any such

group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids ... the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby." *Id.* at 92. But Texas misconstrues the statement. That passage merely identifies the question the Court has "carefully left open," *id.* at 91, and the remainder of the opinion explains why there was once again no reason to resolve it, *viz.*, because Hawaii's use of registered voters did not offend the Constitution.

Texas makes much more of the Court's reference to the "choices about the nature of representation" than can be fairly drawn from the decision. Motion 7. Nothing about this comment suggests states have unfettered discretion to choose any "particular apportionment method" they prefer regardless of the effect on voters. *Id.* 6. After all, if states possess the latitude Texas claims here, the Court would not have explained that there must be, at the end of the day, some apportionment base "against which compliance with the Equal Protection Clause is to be measured." *Id.* at 92. The Court has been appropriately reluctant to interfere with apportionment decisions where there is no indication that the "choice is one the Constitution forbids ...." *Id.* But the question here, unlike in *Burns*, is whether using total population for apportionment is a choice the Constitution forbids when it results in grossly unequal treatment of eligible voters.

Further, Texas does not even try to explain why the Court closely examined Hawaii's use of registered voters if "a State's choice of a particular measure, or combination

of permissible measures, is simply a policy choice left to the legislative process." Motion 12. That is because there is no explanation other than the Court needed to assure itself that the use of this particular metric, as opposed to other more generous and perhaps more appropriate definitions of "state citizenship," such as citizen voting age population, which would have counted all "those eligible to register and vote," *Burns*, 384 U.S. at 92, did "not *on this record* fall short of constitutional standards." *Id.* at 97 (emphasis added). There is no way to reconcile Texas's argument with the way the Court actually applied the one-person, one-vote principle in *Burns*.

Indeed, the Court would be quite surprised to discover that it decided the question in *Burns* given that it declared the issue open only two years later in *Hadley v. Junior College District of Metropolitan Kansas City*, 397 U.S. 50 (1970). Texas claims the issue the Court "found 'no need to decide'" was "whether the chosen base was among the permissible choices." Motion 17 (quoting *Hadley*, 397 U.S. at 57 n.9). That is correct, and it proves that Texas is wrong here.

Hadley confronted the same choice presented here: between total population and an apportionment base that counted only those whose rights were implicated in the districting process (there, school-age population). 397 U.S. at 51-52. If Texas's reading of *Burns* were correct, it would have been a settled issue: the jurisdiction would have had free rein to choose either one. But the Court did not see it that way. As the Court explained, there remained "some question" as to whether "actual population" or "school enumeration" was the constitutionally appropriate "basis for apportionment." *Id.* at 57 n.9 (citing *Burns*, 384 U.S.

at 90-95). In other words, *Burns* had not already resolved the issue. *Hadley*, too, provided no occasion to resolve it because, either way, the plan at issue failed to "insure that each person's vote counts as much, insofar as it as practicable, as any other person's." *Id.* at 54. "Accordingly, the Court has never determined the relevant 'population' that States and localities must equally distribute among their districts." *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001) (Thomas, J., dissenting from denial of certiorari).

Moreover, the Ninth Circuit "has held that districting based on voting populations instead of the total population would have been unconstitutional." *Id.* (citing *Garza v. County of Los Angeles*, 918 F.2d 763, 773-76 (9th Cir. 1991)). Judge Kozinski disagreed, finding that *Burns* "can only be explained as an application of the principle of electoral equality; the Court approved the departure from strict population figures because raw population did not provide an accurate measure of whether the voting strength of each citizen was equal." *Garza*, 918 F.2d at 784 (Kozinski, J., concurring and dissenting in part). The only thing the majority and Judge Kozinski agreed on was that the position Texas takes here is wrong.

Not even the appellate courts on Texas's side of this dispute believe *Burns* resolved the issue. To be sure, these courts think that *Burns* leads that way. *Chen v. City of Houston*, 206 F.2d 502, 526 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212, 1224-25 (4th Cir. 1996). But both courts struggled with the issue and neither thought *Burns* definitively resolved it. Statement 15-16. Even the district court saw this as a "close" question. App. 14a. This could not be a close case if *Burns* decisively resolved the issue.

Regardless, the issue at this point is not who offers the more persuasive reading of *Burns*. The salient point is that the substantial issue is unresolved. Which party has the better view of the full body of precedent, including *Burns*, is the constitutional issue the Court will resolve *after* plenary review is granted.

Beyond its untenable *Burns* argument, all Texas can offer to avert plenary review are half-hearted gestures to certiorari denials and lack of a circuit split. Motion 9-11. But Texas understands that "these certiorari denials do not connote approval of the underlying decisions...." *Id.* 9. More fundamentally, this is an appeal—not a certiorari petition. The distinction matters. Because Congress made review mandatory, the Court will make a decision on the merits one way or the other. The present issue is whether this is a serious appeal or a frivolous one. Statement 12-13.

The absence of a circuit split also has no bearing on whether the question presented is substantial. This Court routinely grants plenary review in direct appeals in the absence of a split, often in cases far more fact-specific than this one. *See, e.g.*, *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). And for good reason. Unlike in typical cases, this Court provides the first and only level of appellate review the district court's judgment will receive. Moreover, Congress has reserved this special process for important issues like constitutional challenges to statewide redistricting plans. That is why only frivolous challenges are denied ordinary appellate review. And that is why the one-person, one-vote appeals in which the Court has granted plenary review are legion. *See, e.g.*, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Board of Estimate of City of New York v.*

Morris, 489 U.S. 688 (1989); *Karcher v. Daggett*, 462 U.S. 725 (1983); *Brown v. Thomson*, 462 U.S. 835 (1983). *Burns* itself was a direct appeal. 384 U.S. at 83. This appeal is equally worthy of full review.

II. Texas Does Not Deny The Importance Of This Constitutional Question And Offers Almost No Defense On The Merits.

Although the criteria for granting certiorari review are inapplicable, this appeal passes that test too. Statement 16-25. Texas does not challenge the question's importance. The right to an equal vote "is the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Hence, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 562. As the *amicus* briefs supporting Appellants further explain, this case squarely implicates that important constitutional concern.

Indeed, Texas's approach is especially harmful to rural communities. Brief Amicus Curiae of Tennessee State Legislators, *et. al.* 13-25. In those instances where this concern arises, using total population instead of voting population will predominantly "burden rural interests by impermissibly counting ineligible residents in urban and suburban districts who are included in the total population count." *Id.* 19. The Court was quite rightly troubled when state geographic districting undermined the constitutional rights of urban voters. *Reynolds*, 337 U.S. at 556-67; *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("How then can one person be given twice or 10 times the voting power of

another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?"). There should be equal concern now that circumstances have reversed.

Moreover, this "is not a Texas-only issue." Tennessee Legislators Br. 13. Just last month, the ACLU filed suit in Florida, claiming that inclusion of "the inmate population at Jefferson Correctional Institution ... unlawfully inflates the political strength of actual residents in the district that houses the prison ... and dilutes the voting strength of those living in all of the other districts in the county." Complaint, *Calvin v. Jefferson County Bd. of Comm'rs*, No. 4:15-cv-00131-MW-CAS (N.D. Fla. Mar. 9, 2015), ¶ 1. Like Appellants, the ACLU believes "[t]he 'one person, one vote' principle of the Equal Protection Clause of the Fourteenth Amendment mandates that each person's vote shall be equal to that of his or her fellow citizens." *Id.* ¶ 42. The issue also proved decisive in a recent case now on appeal to the Ninth Circuit. *Montes v. City of Yakima*, 420 F. Supp. 1377, 1390 (E.D. Wash 2014) ("The only disputed issue involves a purely legal question: whether districts which are approximately equal in total population, but which differ in eligible voting population, violate the 'one person, one vote' principle embodied in the Equal Protection Clause."). In sum, this important constitutional issue is recurring throughout the nation in all manner of communities, and for many different demographic reasons. The Court's guidance is needed.

The only basis for declining plenary review, then, would be because the decision below is obviously correct. But that is not the case. The one-person, one-vote principle makes no sense if—as Texas claims—it does not afford

voters an equal vote. Statement 17-19; *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from denial of certiorari) ("The one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population."). The whole point of the principle is that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 355. If it does not protect against that, it protects nothing.

Texas offers little in the way of a defense. First, Texas argues that the decisions stating that the States need only equalize "population" undermine Appellants' argument. Motion 14-15. There is no question the Court has been "somewhat evasive in regard to which population must be equalized." *Chen*, 206 F.3d at 524. That is why the issue is substantial and needs to be decided here. But that does not mean Texas is correct. Contrary to Texas's argument, "[t]he Equal Protection Clause requires that legislative districts be of nearly equal population, *so that each person's vote may be given equal weight in the election of representatives.*" *Connor v. Finch*, 431 U.S. 407, 416, (1977) (emphasis added). When total population fails to protect voters, another apportionment base is required. *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973).

Second, Texas argues that the drafting history of Section 2 of the Fourteenth Amendment "casts doubt on the notion that the Equal Protection Clause requires States to adopt a voter-population metric." Motion 18. But *Reynolds* rejected that argument. The "federal analogy" is "inapposite and irrelevant to state legislative districting schemes." *Reynolds*, 377 U.S. at 573; *Gaffney*, 412 U.S.

at 741 ("[T]here are fundamental differences between congressional districting ... and ... state legislative reapportionments."). Furthermore, even the decision from which Texas borrowed the theory acknowledged that "the overall context in which the amendment was drafted prevents any firm conclusion being drawn as to the framers' intent regarding the question before us." *Chen*, 206 F.3d at 527.

Last, Texas's political-question argument is meritless. Motion 22-23. Texas's stubborn insistence that its choice of an apportionment base is an unreviewable issue is nothing less than relitigation of *Baker v. Carr*, 396 U.S. 186 (1962), and *Reynolds v. Sims*. The Court has ruled that legislative apportionment challenges are justiciable and that districts must be equal to protect voters' rights. *Davis v. Bandemer*, 478 U.S. 109, 119 (1986) ("Since *Baker v. Carr* ... we have consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts. In the course of these cases, we have developed and enforced the 'one person, one vote' principle.") (citing *Reynolds*, 377 U.S. 533). That is the end of the road for the political-question doctrine with respect to this issue.

The problem Texas faces, of course, is that *Chen*, *Daly*, and the decision below *did* invoke the political-question doctrine—they just did so without using that moniker. Texas thus gets points for candor. But it is nonetheless troubling that, more than 50 years after *Baker* and *Reynolds* settled the issue, Texas relies on the political-question doctrine to avoid judicial review of a classic one-person, one-vote claim.

III. Texas Agrees This Appeal Is The Ideal Vehicle For Deciding The Question Presented.

The parties dispute the merits, but they agree this is the right case to decide the issue. If Texas's exclusive use of total population in Plan S172 is constitutional, the decision below is correct. Motion 20-21. If Texas must equalize voter population, Plan S172 is unconstitutional. Statement 25-29. Accordingly, not only is the question presented squarely raised, fully vetted, and the solitary basis for dismissal below, it is decisive as to which party will secure final judgment. Especially given the direct appeal posture, it would be impossible to find a case better suited to definitive judicial resolution of this important equal-protection issue.

That Texas could have equalized *both* total and voter population only makes this appeal an even more attractive vehicle. *Id.* 27-29. Texas claims this should be irrelevant to the constitutional inquiry, and the district court agreed. Motion 21. But the fact that Texas could have equalized both means the Court need not decide in this case whether "representational equality" is a constitutional value or just a political one. All the Court must do to reverse the district court's decision is reaffirm the bedrock principle that the Equal Protection Clause protects the right of voters to an equal vote. There can be no doubt that the judgment below must fall if the one-person, one-vote principle provides *any* protection for eligible voters. Statement 28-29.

CONCLUSION

The Court should note probable jurisdiction and set this case for oral argument.

Respectfully submitted,

BRENDAN J. MORRISSEY
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006

MEREDITH B. PARENTI
PARENTI LAW PLLC
7500 San Felipe, Suite 600
Houston, Texas 77063

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PLLC
3033 Wilson Boulevard, Suite 700
Arlington, Virginia 22209
(703) 243-9423
will@consovoymccarthy.com

Counsel for Appellants

No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, EDWARD PFENNINGER,
Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF TEXAS, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS UNION IN SUPPORT OF APPELLANTS

PETER J. FERRARA
Counsel of Record
20594 Woodmere Court
Sterling, VA 20165
(703) 582-8466
peterferrara@msn.com

Counsel for Amicus Curiae
American Civil Rights Union

March 2, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	6
THE QUESTION PRESENTED IS SUBSTANTIAL	8
I. THIS CASE PRESENTS THE SUBSTANTIAL QUESTION OF WHETHER THE ONE-PERSON, ONE-VOTE PRINCIPLE PROTECTS THE RIGHTS OF VOTERS TO AN EQUAL VOTE	9
II. THIS COURT'S ONE-PERSON, ONE-VOTE PRECEDENTS PROTECT THE RIGHT OF VOTERS TO AN EQUAL VOTE, CONTRARY TO THE COURT BELOW	13
III. THE U.S. JUSTICE DEPT. ITSELF, IN REDISTRICTING VOTING RIGHTS CASES, USES CITIZENSHIP DATA FOR DETERMINING EQUAL VOTING RIGHTS	15
IV. THE DECISION BELOW FAILED TO PROTECT THE RIGHT OF VOTERS TO AN EQUAL VOTE, IN CONFLICT WITH THE PRECEDENTS OF THIS COURT	23
CONCLUSION	25

TABLE OF AUTHORITIES

CASES	Page(s)
Baker v. Carr, 369 U.S. 186 (1962)	2, 24
Burns v. Richardson, 384 U.S. 73 (1966)	5, 9
Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000)	5
Chen v. City of Houston, 121 S. Ct. 2020 (2001)	6, 9, 10
Davis v. Perry, 991 F. Supp. 2d 809 (W.D. Tex. 2014)	4
Dunn v. Blumstein, 405 U.S. 330, 336 (1972).	14
Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1991)	6, 10
Gaffney v. Cummings, 412 U.S. 735 (1973)	15
Greg v. Sanders, 372 U.S. 368 (1963)	14
Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo., 397 U.S. 50 (1970)	3, 9, 14
Hicks v. Miranda, 422 U.S. 332 (1976)	26
Reynolds v. Simms, 377 U.S. 533 (1964)	2, 14, 15, 23
Thornburgh v. Gingles, 478 U.S. 30 (1986)	16, 18
United States v. Alamosa County, (D. Colo. 2001)	21
United States v. Charleston County, (D.S.C. 2001)	22
United States v. City of Boston, MA, (D. Mass. 2005)	19

TABLE OF AUTHORITIES—Continued

Page(s)

United States v. City of Euclid, et al., (N.D. Ohio 2006) 19

United States v. Crockett County, (W.D. Tenn. 2001) 22

United States v. Euclid City School District Board of Education, OH, (N.D. Ohio 2008). 17

United States v. Georgetown County School District, et. al., (D.S.C. 2008) 18

United States v. Osceola County, (M.D. Fla 2005) 19, 20

United States v. Osceola County, (M.D. Fla. 2002) 23, 24

United States v. The School Board of Osceola County, (M.D. Fla. 2008) 17, 18, 19

United States v. Town of Lake Park, FL, (S.D. Fla. 2009) 16

Wesberry v. Saunders, 376 U.S. 1 (1964) 14

OTHER AUTHORITIES

Cases Under Section 2 of the Voting Rights Act, United States Department of Justice, http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php#osceola_school 26

E. Glassman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice 304 (10th ed. 2013) 9

INTEREST OF THE *AMICUS CURIAE* [1]

The American Civil Rights Union is a non-partisan, non-profit, 501(c)(3), legal/educational policy organization dedicated to defending all of our constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues in cases nationwide.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General, Edwin Meese III; former Assistant Attorney General for Civil Rights, William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel, Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University, Walter E. Williams; former Ambassador to Costa Rica, Curtin Winsor, Jr.; former Ohio Secretary of State, J. Kenneth Blackwell; former prosecutor, Voting Rights Section, U.S. Department of Justice, J. Christian Adams; and former Counsel to

---

[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties were timely notified and have consented to the filing of this brief.

the Assistant Attorney General for Civil Rights and member of the Federal Election Commission, Hans von Spakovsky.

This case is of interest to the ACRU because it is concerned to protect the sanctity and integrity of voting.

STATEMENT OF THE CASE

Appellants Sue Evenwell and Edward Pfenninger are registered voters residing respectively in Texas Senate District 1 and Texas Senate District 4. Both vote regularly. App. 5a.

Appellants filed suit in the United States District Court for the Western District of Texas under 42 U.S.C. Section 198 challenging the current Texas Senate Election District map, alleging that the currently drawn districts violate the one-person, one-vote principle of the Equal Protection Clause. They seek a permanent injunction against further use of the current Texas Senate District map in future elections. App. 34a.

After every decennial Census, the state legislatures of every state, including Texas, redraw the election districts for every state legislator, as well as for each of the state's Congressional representatives. Well established precedents of this Court establish fundamental principles guiding how these election districts may be drawn. *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Simms*, 377 U.S. 533

(1964); and *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50 (1970), among several others.

These precedents establish the one-person, one-vote principle, requiring roughly equal numbers of voters in each district, so that effectively every voter in a state would carry roughly equal weight as far as practicable. This principle stems from the basic, equal right of every voter to participate in elections.

The Texas Senate Redistricting

Article III, Section 28 of the Texas Constitution provides that the Texas Legislature shall reapportion the State's election districts at its first regular session after publication of the latest federal decennial Census. The Constitution further provides in Article III, Section 25 that "[t]he State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator."

The Texas Legislature first carried out these duties by passing Plan S148 as the redistricting plan for the Senate after the 2010 decennial Census. That was included in H.B. 150, which also covered redistricting for the State House, and Congressional districts, signed into law by former Governor Rick Perry on June 17, 2011.

After legal challenges were brought against all three redistricting plans in H.B. 150, a three-judge panel of the United States District Court for the Western District of Texas found there was "a not insubstantial claim" that Plan S148 violated Section 5

of the Voting Rights Act. The three-judge panel consequently created Plan S172 as an interim map for the 2012 State Senate elections. *Davis v. Perry*, 991 F. Supp. 2d 809, 817-18 (W.D. Tex. 2014). On June 21, 2013, the Texas Legislature adopted Plan S172 as the permanent Senate election district map for the post 2010 decennial Census, signed into law by Governor Perry on June 26, 2013.

The finally adopted Plan S172 can be evaluated under different metrics for measuring the population of each district. Those include (1) the Citizen Voting Age Population (CVAP) from the three American Community Surveys ("ACS") conducted by the U.S. Census Bureau for the 2010 decennial Census; (2) the total voter registration numbers for each district as counted by the State of Texas for 2008 and 2010; and (3) the non-suspense voter registration numbers counted by Texas for 2008 and 2010.[2]

Theoretically "ideal," relatively equal Senate district populations were calculated based on each of the three alternative measures of district population specified above. The Plan 172 districts varied from these "ideal" district populations by 46% to 55%, depending on which of the three above alternative population measures is used for the calculation. App. 26a-30a; Supplemental Appendix ("SA") 2-12.

That means the votes of the residents of some districts count roughly one and a half as much as the

---

[2] Non-suspense voter registration is total voter registration minus previously registered voters who fail to respond to confirmation of residence notices sent by the county voter registrar to the registered residence address of each voter.

votes of the residents of other districts. That results because redistricting Plan S172 was based on creating districts of relatively equal total population, not equal numbers of voters. Because extensive localities in Texas include large numbers of non-citizens who cannot legally vote, Plan S172 effectively favored such areas with more political power over other areas composed more homogenously of American citizens.

The Present Litigation

Appellee/Defendants responded to the present litigation by filing a motion to dismiss for failure to state a claim on which relief can be granted, which the district court granted on November 15, 2014. App. 3a-14a. The district court recognized that the present suit was based on data showing "that the [Senate election] districts vary widely in population when measured against various voter-population metrics." App. 5a.

The district court concluded that the choice of which population metric to use in apportioning districts should be "left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." App. 13a. (Based on *Burns v. Richardson*, 384 U.S. 73 (1966); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996). The district court essentially decided that the proper population metric to use for the Constitution's fundamental one-person, one-vote principle was a political question best left to the political process rather than to Constitutional principle ensuring an equal vote for all.

Most fundamentally, the district court ruled, "the decision whether to exclude or include individuals who are ineligible to vote from an apportionment base 'involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.'" App. 11a.

SUMMARY OF ARGUMENT

The question on the appeal in the present case, which asks what measure of population should be used for determining whether the population is equally distributed among the districts, is obviously substantial, justifying plenary review. Justice Thomas made that point in dissenting from the denial of certiorari in *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001). Thomas pointed out that this Court "has never determined the relevant 'population' that States and localities must equally distribute among their districts," and, therefore, the Court has "left a critical variable in the requirement undefined."

Indeed, the present case raises a critical but still unsettled constitutional issue, whether the one-person, one vote principle protects the rights of voters to an equal vote, or whether election districts can be drawn to grant more political power to residents who are not American citizens (and may even be in the country illegally) and so are prohibited from voting by federal and state law.

Dissenting in *Garza v. County of Los Angeles*, 918 F.2d 763, 785 (9th Cir. 1991), Judge Kozinski supported the same position as Appellants in this case, arguing that, "[T]he name by which the Court has

consistently identified this constitutional right—one person, one vote—is an important clue that the Court's primary concern is with equalizing the voting power of electors [voters], making sure that each voter gets one vote—not, two, five, ten or one-half." 918 F.2d at 782.

Kozinski is quite right. The precedents of this Court make clear that the one person, one vote doctrine protects the right of every voter to an equal vote.

These precedents are the reason why redistricting and other suits brought by the U.S. Justice Department under Section 2 of the Voting Rights Act have been based on Citizen Voting Age Population (CVAP), or otherwise focused on the rights of citizens who can vote, or on "voters," rather than on total population. The Justice Department, as the designated chief enforcer of the Voting Rights Act, concentrates on the numbers of eligible *citizen* voters when evaluating possible violations of the law and allegations of unequal treatment. The Department of Justice has plainly used citizenship data in redistricting case after redistricting case, voting case after voting case. This policy is plain on the face of the complaints in Lake Park, Euclid, Osceola, Georgetown, Boston, Alamosa, Crockett County, etc.

But the decision of the district court below declined to follow the above long line of precedents of this Court, and the practice of the Justice Dept. itself, protecting the right of voters to an equal vote. The court below said whether the doctrine of so-called one-person, one-vote protected the right of voters to an

equal vote, or the right of total population to supposed equal chances to get on their representative's appointments calendar, was a political question that each state was free to decide on its own. The decision below consequently failed to protect the right of voters to an equal vote, in conflict with the precedents of this Court.

For all of these reasons, this Court should note probable jurisdiction and set this case for oral argument.

THE QUESTION PRESENTED IS SUBSTANTIAL

The immediate issue before this Court at this stage is only whether to note probable jurisdiction and set the case for oral argument or to summarily affirm the district court's decision below. The Court should grant review in this case because the question presented is substantial.

Indeed, the present case raises a critical but still unsettled constitutional question, whether the one-person, one vote principle protects the rights of voters to an equal vote, or whether election districts can be drawn to grant more political power to residents who are not American citizens (and may even be in the country illegally) and so are prohibited from voting by federal and state law.

I. THIS CASE PRESENTS THE SUBSTANTIAL QUESTION OF WHETHER THE ONE-PERSON, ONE-VOTE PRINCIPLE PROTECTS THE RIGHTS OF VOTERS TO AN EQUAL VOTE.

The practice for direct appeals such as the present case is that the Court notes probable jurisdiction and sets the case for oral argument as long as the question presented is substantial. *Hicks v. Miranda*, 422 U.S. 332, 344 (1976). Such plenary review is warranted unless "after reading the condensed arguments presented by counsel in the jurisdictional statement and the opposing motion, as well as the opinion below, the Court can reasonably conclude that there is so little doubt as to how the case will be decided that oral argument and further briefing will be a waste of time." E. Glassman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* 304 (10th ed. 2013).

The question on the appeal in the present case, "which asks what measure of population should be used for determining whether the population is equally distributed among the districts," is obviously substantial. Justice Thomas made that point in dissenting from the denial of certiorari in *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001). Thomas pointed out that this Court "has never determined the relevant 'population' that States and localities must equally distribute among their districts," and, therefore, the Court has "left a critical variable in the requirement undefined." *Id. ACCORD*: *Burns*, 384 U.S. at 91 (The Court has "carefully left open the question [of] what population" base is paramount for one-person, one-vote purposes"); *Hadley*, 397 U.S. at 58, n.9 (same); *Chen*, 206 F.3d at 524 (Judge Garwood noted that the "Supreme Court has from the beginning

of this line of cases been somewhat evasive in regard to which population must be equalized"); *Garza v. County of Los Angeles*, 918 F.2d 763, 785 (9th Cir. 1991) (Kozinski, J., concurring in part and dissenting in part).

That major undefined gap remaining in this Court's one-person, one-vote jurisprudence alone makes the question presented in this case substantial, justifying plenary review. As Thomas further explained in dissenting from the denial of certiorari in *Chen*, "The one person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population. But as long as we sustain the one-person, one-vote principle, we have an obligation to explain to States and localities what it actually means." *Id.*

In *Garza*, the Ninth Circuit panel majority held that the Equal Protection Clause constitutionally required Los Angeles County to use total Census population in redistricting, regardless of how many voters resided in each district as a result. The Ninth Circuit majority said, "the people, including those who are ineligible to vote, form the basis for representative government," and, therefore, total population as counted by the Census was the "appropriate basis for state legislative apportionment." 918 F.2d at 774.

The Ninth Circuit majority ruled that basing the districts on total *voter* population would violate the Equal Protection Clause by producing "serious population inequalities across districts" which would result in "[r]esidents of the more populous districts [having] less access to their elected representative." *Id.* The panel majority further argued basing the

districts on voter population would also violate the Petition Clause of the First Amendment by denying voters fair access to their elected officials, saying, "Interference with individuals' free access to elected officials impermissibly burdens their right to petition the government." 918 F.2d at 775.

But in dissent, Judge Kozinski supported the same position as Appellants in this case, arguing that, "[T]he name by which the Court has consistently identified this constitutional right—one person, one vote—is an important clue that the Court's primary concern is with equalizing the voting power of electors [voters], making sure that each voter gets one vote—not, two, five, ten or one-half." 918 F.2d at 782.

Kozinski explained that the Equal Protection Clause "protects a right belonging to the individual elector [voter] and the key question is whether the votes of some [voters] are materially undercounted because of the manner in which districts are apportioned." 918 F.2d at 782. He added that this right "assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of [voters] in another location." *Id.*

The issue that Kozinski identifies is exactly the issue/problem in the present case before this Court. Plaintiffs in this case allege precisely that their votes "are materially discounted because of the manner in which districts [in Plan S172] are apportioned," and "dilution of that important right by having their vote given less weight than that of [voters] in another location." Because the Senate districts in Plan 172 are

based on total population, rather than on citizens that have the right to vote, the weight of voters in some Senate districts (with fewer non-citizen residents that cannot vote) counts roughly one and a half times as much as the vote of Plaintiffs in their districts.

That problem would be solved if the Senate districts at issue in this case were apportioned based on equal numbers of citizens with the right to vote, rather than equal numbers of total population. That would be consistent with the one-person, one-vote principle, as it would protect the right of all voters in the state to an equal vote with the same weight. As Kozinski rightly explains, "at the core of one-person, one-vote is the principle of electoral equality, not that of equality of representation." 918 F.2d at 782.

Again, because this case involves a direct appeal from a three-judge district court panel ruling on constitutional rights, and not a petition for certiorari, that argument is decisive, as it cannot be seriously argued that Justice Thomas and Judge Kozinski are not only wrong, but so clearly wrong that oral argument and full briefing would be a waste of time.

To the contrary, we agree with Justice Thomas and Judge Kozinski that the constitutional right protected by the one-person, one-vote principle is the right to an equal vote of the same weight as all other voters, not a right of equal access to representation by non-citizens as full American citizens. As Kozinski said, that is why the principle is called "one-person, one-vote." There is no evidence in the present case that districts of equal voters, rather than equal population, would leave non-citizens without effective access to

their district's Senator, which would be an implausible claim on its face.

Moreover, the Fifth Circuit agreed as well that Judge Kozinski's opinion cannot so easily be dismissed out of hand. Judge Garwood recognized for the court in *Chen* that Judge Kozinski had made "a powerful case that the general tenor of the Court's opinions mandates protection of the individual potential voter." 206 F.3d at 525. Even though the Fifth Circuit reached a different conclusion in *Chen*, that does not mean in a direct appeal like this that the question is not substantial. Continued differences on the issue only further confirms that this Court should proceed with plenary review of the present case.

Indeed, even the district court below admitted that this issue presents a "close" question, App. 14a, as the court in *Chen* did, 206 F.3d at 523. The present case provides this Court with a timely opportunity to now definitively resolve this fundamental question at the foundation of the one-person, one-vote principle.

II. THIS COURT'S ONE-PERSON, ONE-VOTE PRECEDENTS PROTECT THE RIGHT OF VOTERS TO AN EQUAL VOTE, CONTRARY TO THE COURT BELOW.

While this Court has never definitively resolved what population the principle of one-person, one-vote applies to, the precedents of this Court make clear that the doctrine protects the right of every voter to an equal vote.

This Court announced in *Reynolds v. Sims*, 377 U.S. at 577-78 (1964), that "all who participate in [an] election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be...."

This Court added in *Hadley* that the Equal Protection Clause "requires that each qualified voter must be given an equal opportunity to participate in that election." 397 U.S. at 56. Consequently, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will ensure, as far as is practicable, that equal numbers of voters can vote proportionally for equal numbers of officials." *Hadley*, 397 U.S. at 56; *Reynolds*, 377 U.S. at 568.

As *Reynolds* explained, the Equal Protection Clause protects "the right of all qualified citizens to vote." 377 U.S. at 554. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Saunders*, 376 U.S. 1, 17 (1964). A citizen, therefore, "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). As this Court noted further in *Greg v. Sanders*, 372 U.S. 368, 380 (1963), "The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions."

Reynolds, 377 U.S. at 565, further explained "[w]ith respect to the allocation of legislative

representation, all voters, as citizens of a state, stand in the same relation regardless of where they live." *Reynolds*, 377 U.S. at 557-58, adds, "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with the votes of citizens living in [other] parts of the State." Kozinski summarizes, "References to the personal nature of the right to vote as the bedrock on which the one person one vote principle is founded appear in the case law with monotonous regularity." *Garza*, 918 F.2d at 782 (Kozinski, J., concurring in part and dissenting in part).

Gaffney v. Cummings, 412 U.S. 735, 746 (1973) explained the principle in the way most relevant to the question at issue in this case, saying, "Total population...may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because 'census persons' are not voters."

III. THE U.S. JUSTICE DEPT. ITSELF, IN REDISTRICTING VOTING RIGHTS CASES, USES CITIZENSHIP DATA FOR DETERMINING EQUAL VOTING RIGHTS.

These precedents are the reason why redistricting and other suits brought by the U.S. Justice Department under Section 2 of the Voting Rights Act[3]

---

[3] All cases brought under Section 2 of the Voting Rights Act, with the complaints and other documents linked, are listed at the Justice Dept. website under Cases Raising Claims Under Section 2 of the Voting Rights Act.

have been based on Citizen Voting Age Population (CVAP), or otherwise focused on the rights of citizens who can vote, or on "voters."

For example, the Justice Dept. Complaint in *United States v. Town of Lake Park, FL*, (S.D. Fla. 2009), alleged "Plaintiff challenges the at-large method of electing the Town of Lake Park Commission on the grounds that it dilutes the voting strength of black *citizens* in violation of Section 2...." (emphasis added), and thus the first *Gingles* precondition was satisfied. See, *Thornburgh v. Gingles*, 478 U.S. 30, 50-51 (1986). To determine whether a minority group "is sufficiently large and geographically compact to constitute a majority in a single member district," the Justice Department explicitly turns to citizenship voting age population to satisfy the first *Gingles* precondition. *Id.*

Indeed, as the foundation for the remedy sought, the Complaint further alleged, "The black population of the Town is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant Commission can be drawn in which black persons would constitute a majority of the total population, voting age population, and *citizen voting age population* in at least one district." (emphasis added).

The Cause of Action section of the Complaint alleged, "the at-large method of electing the

---

http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php #osceola_school

Commission has the effect of diluting black voting strength, resulting in black *citizens* being denied an opportunity equal to that afforded to other members of the electorate," and "Unless enjoined by order of this Court, Defendants will continue to conduct elections for the Commission under the present method of election that denies black *citizens* the opportunity to participate equally with white *citizens*...." (emphasis added).

The Justice Department Complaint in *United States v. Euclid City School District Board of Education, OH,* (N.D. Ohio 2008) also reveals Justice policy on which population group should be used in Section 2 lawsuits involving legislative districts. The Complaint alleged, "The at-large method of electing the Euclid Board of Education dilutes the voting strength of African-American *citizens*, in violation of Section 2 of the Voting Rights Act...." (emphasis added). As the foundation for the remedy sought by the Complaint, the U.S. Justice Dept. alleged, "The African-American population of Euclid is sufficiently numerous and geographically compact that a properly apportioned five single-member district plan for electing Defendant Euclid City School District Board of Education can be drawn in which African-Americans would constitute a majority of the total population and *voting age population* in one district."

The Cause of Action section of the Complaint alleged, "the at-large election system for electing Defendant Euclid City School District Board of Education...result[s] in African-American *citizens* being denied an opportunity equal to that afforded to other members of the electorate...." and "Unless

enjoined by order of this Court, Defendants will continue to conduct elections for the Euclid City School District Board of Education under the present method of election that denies African-American *citizens* the opportunity to participate equally with white citizens...." (emphasis added).

The Department of Justice policy of using only citizen population data was again manifested in the case of *United States v. The School Board of Osceola County*, (M.D. Fla. 2008). In that Complaint, the Justice Dept. alleged, "The Hispanic population of the county is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the School Board can be drawn in which Hispanic persons would constitute a majority of the *citizen voting-age population* in one out of five districts." (emphasis added).

Yet another Justice Department redistricting case revealed that citizenship data is the proper data set to be used in determining liability under the first *Gingles* precondition. In *United States v. Georgetown County School District, et. al.*, (D.S.C. 2008), the Justice Dept. Complaint alleged, "The African-American population of the county is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant Board can be drawn in which black *citizens* would constitute a majority of the total population, and voting age population in three districts." (emphasis added). The Cause of Action section of the brief seeks relief against practices "resulting in African-American *citizens* being denied an opportunity equal to that afforded to other members of the electorate to participate in the political

process and elect representatives of their choice...." (emphasis added).

In *United States v. City of Euclid, et al.*, (N.D. Ohio 2006), an earlier Justice Dept. Complaint seeking relief alleged that "the at-large/ward method of electing the Euclid City Council dilutes the voting strength of African-American *citizens*, in violation of Section 2 of the Voting Rights Act...." (emphasis added). The Complaint further alleged that "The African-American population of the City of Euclid is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant City Council can be drawn in which black *citizens* would constitute a majority of the total population, and voting age population in two districts." (emphasis added). The Cause of Action section of the Complaint seeks relief from practices "resulting in African-American *citizens* being denied an opportunity equal to that afforded to other members of the electorate to participate in the political process and elect representatives of their choice, in violation of Section 2 of the Voting Rights Act." (emphasis added).

In *United States v. City of Boston, MA*, (D. Mass. 2005), the Justice Dept. Complaint was based explicitly on "*citizen voting age population*." The Second Cause of Action alleges, "Under the totality of the circumstances that exist in Boston, Defendants' conduct has had the effect of denying limited English proficient Hispanic and Asian American *voters* an equal opportunity to participate in the political process and to elect candidates of their choice on an

equal basis with *other citizens* in violation of Section 2 of the Voting Rights Act." (emphasis added).

The Prayer for Relief section of the brief sought relief "to ensure that Spanish-speaking *citizens* are able to participate in all phases of the electoral process," and to prevent Boston "from implementing practices and procedures that deny or abridge the rights of limited English proficient Hispanic and Asian American *citizens* in violation of Section 2 of the Voting Rights Act." The Prayer for Relief also sought an injunction "requiring Defendants to devise and implement a remedial program that provides Boston's limited English proficient Hispanic and Asian American *citizens* the opportunity to fully participate in the political process consistent with Section 2 of the Voting Rights Act." (emphasis added).

An earlier Justice Dept. Complaint in *United States v. Osceola County*, (M.D. Fla 2005) alleged, "In conducting elections in Osceola County, Defendants have failed to ensure that all *Hispanic citizens* with limited-English proficiency have an equal opportunity to participate in the political process and to elect the representatives of their choice," and "The effects of discrimination on *Hispanic citizens* in Osceola County, including their markedly lower socioeconomic conditions relative to *white citizens*, continue to hinder the ability of *Hispanic citizens* to participate effectively in the political process in county elections." (emphasis added).

The Complaint further alleged, "Upon information and belief, a majority of Board members in 1994-96 recognized that the growth of the Hispanic population would result in Hispanic voters achieving the ability

to elect a candidate of their choice in one or more districts under the single-member district method of election," and "In 1996, a Hispanic candidate ran in Board of Commissioners District One, and was elected to the Board under the single-member district method of election."

The Complaint explained, "In 2001, the Board of Commissioners appointed a redistricting committee to redistrict the county's residency districts. Commissioners expressed concern about the possibility they would be forced to change their method of election in the future, and the residency district plan was adopted with this concern in mind." The Complaint added, "The residency districts adopted by the Board in 2001 split heavily Hispanic population concentrations." Consequently, the Complaint alleged, "Implemented in the totality of circumstances described in paragraphs 8 to 31, the current at-large method of electing the Board of Commissioners of Osceola County has the effect of diluting Hispanic voting strength, resulting in *Hispanic citizens* of the county having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, in violation of Section 2." (emphasis added).

In *United States v. Alamosa County*, (D. Colo. 2001), the Justice Dept. Complaint alleged, "The current at-large method of electing the members of the Alamosa County Board of Commissioners violates Section 2 of the Voting Rights Act, because it results in *Hispanic citizens* of the county having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice...." (emphasis added).

In *United States v. Crockett County*, (W.D. Tenn. 2001), the Complaint alleged, "The current districting plan for electing the members of the Crockett County Board of Commissioners violates Section 2 of the Voting Rights Act because it results in *black citizens* of the county having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." (Emphasis added). The Complaint further alleged, "The black population of Crockett County is sufficiently numerous and geographically compact that a properly apportioned multi-member district plan for electing the defendant Board of Commissioners can be drawn in which black voters would constitute an effective majority in two districts out of twelve."

In *United States v. Charleston County*, (D.S.C. 2001), the Justice Dept. Complaint alleged, "Under the totality of the circumstances, the at-large election system for electing the Charleston County Council has the effect of diluting black voting strength, resulting in *black citizens* being denied an opportunity equal to that afforded to other members of the electorate to participate in the political process and elect representatives of their choice, in violation of Section 2 of the Voting Rights Act." The Complaint further alleged, "The black population of Charleston County is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant County Council can be drawn in which black citizens would constitute a majority of the total population, voting age population, and registered voters in three districts."

Thus, it is clear that the Justice Department, as the designated chief enforcer of the Voting Rights Act, concentrates on the numbers of eligible *citizen* voters when evaluating possible violations of the law and allegations of unequal treatment. The Department of Justice has plainly used citizenship data in redistricting case after redistricting case, voting case after voting case. This policy is plain on the face of the complaints in Lake Park, Euclid, Osceola, Georgetown, Boston, Alamosa, Crockett County, etc.

IV. THE DECISION BELOW FAILED TO PROTECT THE RIGHT OF VOTERS TO AN EQUAL VOTE, IN CONFLICT WITH THE PRECEDENTS OF THIS COURT.

The decision of the district court below declined to follow the above long line of precedents of this Court, and the practice of the Justice Dept. itself, protecting the right of voters to an equal vote. The court below said whether the doctrine of so-called one-person, one-vote protected the right of voters to an equal vote, or the right of total population to supposed equal chances to get on their representative's appointments calendar, was a political question that each state was free to decide on its own.

Reynolds itself seems to directly reject the reasoning of the district court below, saying,

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to

> political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less.

377 U.S. at 566.

Indeed, the doctrine of one-person, one-vote logically and morally grows directly out of the fundamental right to vote itself. The equal right of all to vote logically gives rise to the right of all to an equal vote. This Court in enforcing one-person, one-vote is just enforcing the equal right of all to vote.

This logic can be seen at the root of the rise of one-person, one-vote in *Baker v. Carr*, 369 U.S. 186 (1962). This Court in that landmark case effectively rejected the district court's political question doctrine in finding that the Plaintiffs in that case had standing as "*voters* of the state of Tennessee" and that "*voters* who allege facts showing disadvantage to themselves as individuals have standing to sue." 369 U.S. 186, 204, 206 (1962) (emphasis added). This Court consequently found that the apportionment challenge of the Tennessee voters was "justiciable, and if discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Id.* at 209-10. This ruling on this reasoning logically forecloses the political question abdication of the district court below.

CONCLUSION

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that

this Court should note probable jurisdiction and set this case for oral argument.

Respectfully submitted,

PETER J. FERRARA
Counsel of Record
AMERICAN CIVIL RIGHTS UNION
20594 Woodmere Court
Sterling, VA 20165
(703) 582-8466
peterferrara@msn.com

Counsel for Amicus Curiae
American Civil Rights Union

March 2, 2015

Supreme Court, U.S.
FILED
MAR 5 - 2015
OFFICE OF THE CLERK

No. 14-940

In the Supreme Court of the United States

Sue Evenwel, et al.,

Appellants,

v.

Greg Abbott,
in his official capacity as Governor of Texas, et al.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF THE CATO INSTITUTE AND REASON FOUNDATION AS *AMICI CURIAE* SUPPORTING APPELLANTS

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
One Bunker Hill Building
601 W. Fifth St., Ste. 800
Los Angeles, CA 90071
(213) 617-0414
mklausner@mac.com

Ilya Shapiro
Counsel of Record
Julio Colomba
CATO INSTITUTE
1000 Mass. Ave., N.W
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org
jcolomba@cato.org

March 5, 2015

QUESTION PRESENTED

Whether the Fourteenth Amendment's "one-person, one-vote" principle creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. SECTION 2 AND THE FOURTEENTH AMENDMENT ARE AT A "BLOODY CROSSROADS" 4

A. One-Person, One-Vote Is Part of the Equal Protection of Voting Rights 4

B. Recent Section 2 Interpretations Have Undermined One-Person, One-Vote 7

II. THE DIVERGENCE BETWEEN TOTAL POPULATION AND CVAP CREATED THE CONFLICT BETWEEN SECTION 2 AND THE FOURTEENTH AMENDMENT 10

III. THIS COURT ALONE HAS THE DUTY TO ANSWER THE QUESTION PRESENTED AND UPHOLD THE CONSTITUTIONAL PRINCIPLE OF VOTER EQUALITY 14

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Avery v. Midland County,
390 U.S. 474 (1968) 6

Baker v. Carr,
369 U.S. 186 (1962) 18

Bartlett v. Strickland,
556 U.S. 1 (2009) 8

Bd. of Estimate of City of New York v. Morris,
489 U.S. 688 (1989) 6, 7, 16

Benavidez v. City of Irving,
638 F Supp. 2d 709 (N.D. Tex. 2009) 8

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 5

Brown v. Thomson,
462 U.S. 835 (1983) 12

Burns v. Richardson,
384 U.S. 73 (1966) 6, 10-11

Chapman v. Meier,
420 U.S. 1 (1975) 6

Chen v. City of Houston,
532 U.S. 1046 (2001) 3, 15

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2000) 3, 9

City of Boerne v. Flores,
521 U.S. 507 (1997) 8-9, 17-18

Colegrove v. Green,
328 U.S. 549 (1946) 5

Connor v. Finch,
421 U.S. 407, 416 (1977) 15

Daly v. Hunt,
93 F.3d 1212 (4th Cir. 1996)..... 3, 9

Gaffney v. Cummings,
412 U.S. 735 (1973) 6, 11

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1991)..... *passim*

Georgia v. Ashcroft,
539 U.S. 461 (2003) 7

Gomillion v. Lightfoot,
364 U.S. 339, 347 (1960) 18

Gray v. Sanders,
372 U.S. 368 (1963) 4-5, 7, 8, 10

Hadley v. Junior Coll. Dist. of Metro. Kansas City,
397 U.S. 50 (1970) 6

Lepak v. City of Irving,
453 Fed. Appx. 522 (5th Cir. 2011)..... 3

Lockport v. Citizens for Cmty. Action,
430 U.S. 259 (1977) 6

Mahan v. Howell,
410 U.S. 315 (1973) 13

Marbury v. Madison,
5 U.S. (Cranch 1) 137 (1803) 17

Perry v. Perez,
132 S. Ct. 934 (2012) 4, 8

Reynolds v. Sims,
377 U.S. 533 (1964) ..... *passim*

Shelby County v. Holder,
133 S. Ct. 2612 (2013) 8

South v. Peters,
339 U.S. 276 (1950) 5

Thornburg v. Gingles,
478 U.S. 30 (1986) 7, 8

Wesberry v. Sanders,
376 U.S. 1 (1964) 6, 7, 16

Statutes and Constitutional Provisions

Voting Rights Act of 1965,
42 U.S.C. § 1973 *et seq*. ..... *passim*

U.S. Const. amend. XIV ..... *passim*

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Reason Foundation is a nonpartisan public policy think tank founded in 1978. Its mission is to advance a free society by developing and promoting libertarian principles and policies. Reason supports market-based solutions that encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, online commentary, and policy research reports. To further its commitment to "Free Minds and Free Markets," Reason files briefs on significant constitutional issues.

Amici's main concern here is resolving the conflict between Section 2 of the Voting Rights Act (VRA) and the Fourteenth Amendment's "one-person, one-vote" principle (OPOV). Section 2's goal of preventing racial discrimination in voting is unquestionably just (and constitutional), but courts shouldn't be permitted to interpret this provision in a way that violates the basic constitutional guarantee of voter equality.

---

[1] Rule 37 statement: All parties were given timely notice of intent to file and written communications from Appellants' and Appellees' counsel consenting to this filing have been submitted to the Clerk. Further, *amici* states that no part of this brief was authored by any party's counsel, and that no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

Once again this Court finds itself at the intersection of the VRA and the Fourteenth Amendment.[2] The parties here are caught in the inevitable trap of (1) maintaining majority-minority districts under complex, overlapping standards and (2) administering electoral schemes that do little to advance racial equality while doing much to violate *voter* equality—the idea that each eligible voter's vote should count equally. In the background of this conflict, there lurks a cacophony of precedent and oft-conflicting court-administered standards that have arisen from Section 2 cases. Basic constitutional guarantees of equal protection inherent in the Fourteenth Amendment—such as OPOV—are getting lost in this thicket.

Avoiding racial discrimination under these circumstances is particularly difficult in jurisdictions where "total population" and "citizens of voting age population" (CVAP)—standard metrics for evaluating whether a district violates OPOV—diverge due to varied concentration of non-citizens. As with the tensions *amicus* Cato has described before, jurisdictions navigating between the VRA's Scylla and the Constitution's Charybdis are bound to wreck individual rights—here, voter equality—on judicial shoals.

Over the years the Court has repeatedly recognized the potential for devaluing individual votes by drawing majority-minority districts in a manner that

---

[2] *Amicus* Cato has argued that courts face a "bloody crossroads" when interpreting Sections 2 and 5 of the VRA. *See, e.g.*, Brief of Cato Inst. as *Amicus Curiae* at 20-28, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); Brief of Cato Inst. as *Amicus Curiae* at 29-32, *Perry v. Perez*, 132 S. Ct. 934 (2012). Now we see that Section 2 is also in tension with the Fourteenth Amendment.

accords greater weight to minority votes in protected districts and diminishes the relative weight of voters elsewhere. Even the Fifth Circuit recognized this danger while ultimately ruling the other way. *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000) ("[T]he propriety under the Equal Protection Clause of using total population rather than a measure of potential voters also presents a close question."). Nevertheless, here the special district court panel adhered to that flawed lower-court precedent—tepidly refusing to acknowledge CVAP as integral to OPOV and thus a requisite element of constitutional equal protection. At least one member of this Court has already recognized the urgency of the problem: "Having read the Equal Protection Clause to include a 'one-person, one-vote' requirement, and having prescribed population variance that, without additional evidence, often will satisfy the requirement, we have left a critical variable in the requirement undefined." *Chen v. City of Houston*, 532 U.S. 1046, 1047 (2001) (Thomas, J., dissenting from the denial of cert.).

Section 2 and the Fourteenth Amendment have thus reached an impasse that has been highlighted by a conflict among lower courts' application of OPOV. *See Chen*, 206 F.3d 502; *Lepak v. City of Irving*, 453 Fed. Appx. 522 (5th Cir. 2011); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1991). This Court has clearly left pending a substantial question regarding the continued viability of OPOV and voter equality under the Fourteenth Amendment. Accordingly, the Court should take up this case and resolve that conflict once and for all—by explaining the proper use of different population metrics and saving OPOV from the judicial morass the VRA has become.

ARGUMENT

I. SECTION 2 AND THE FOURTEENTH AMENDMENT ARE AT A "BLOODY CROSSROADS"

The judiciary has reached a new "bloody crossroads" at the intersection of the Voting Rights Act and the Constitution. It is from this judicial conflict that the instant appeal arises. Section 2 was designed to reinforce the Fourteenth Amendment's equal protection guarantees, including OPOV. Courts tasked with policing Section 2 racial-discrimination claims must therefore ensure that new electoral maps comply with the Fourteenth Amendment. *Perry v. Perez*, 132 S. Ct. 934, 941-42 (2012). The district court panel here, however—adhering to Fifth Circuit precedent counseling deference to the political judgment of elected officials trying to comply with Sections 2 and 5—ratified a redistricting plan that violates OPOV.[3] *Amici* urge the Court to end this conflict by recommitting to OPOV and the voter-equality protections inherent in the Fourteenth Amendment.

A. One-Person, One-Vote Is Part of the Equal Protection of Voting Rights

This Court derived OPOV from "the conception of political equality [in] the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments," and declared that these principles "can mean only one thing—one person one vote." *Gray v. Sanders*,

---

[3] Expounding on the broader dimensions of OPOV, the Court in *Gray v. Sanders* held that "the Fifteenth Amendment [also] prohibit[s] a state from overweighting or diluting votes on the basis of race." 372 U.S. 368, 380 (1963).

372 U.S. 368, 381 (1963). In *Reynolds v. Sims*, the Court found that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 533, 555 (1964). As the Court explained, "weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." *Id.* at 563. The Court was so emphatic about the fundamentality of OPOV that it held that "diluting the weight of votes . . . impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race." *Reynolds*, 377 U.S. at 566 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

Even before *Reynolds*, this Court had viewed the right to vote as more than just "the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth . . . . It also includes the right to have the vote counted at full value without dilution or discount." *South v. Peters*, 339 U.S. 276, 279 (1950). As early as 1950, the Court had expressly ruled that a "federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [while] groups not in favor have their votes discounted." *Id. See also Colegrove v. Green*, 328 U.S. 549, 569-571 (1946) (Black, J., dissenting) ("No one would deny that the equal protection clause would . . . prohibit a law that would expressly give certain citizens a half-vote and others a full vote . . . . The Constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast.").

The "one-person, one-vote" principle has come to be seen as this Court's resolute declaration that "a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted." *Garza v. County of Los Angeles*, 918 F.2d 763, 782 (9th Cir. 1991) (Kozinski, J., concurring in part, dissenting in part) (citation omitted). Over the years, the Court's position has been clear: it is unconstitutional to devalue individual votes by drawing majority-minority districts that strengthen the power of one constituency while weakening the power of another. *See, e.g., Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688, 701 (1989) (noting that the "relevant inquiry" in redistricting cases "is whether the vote of any citizen is approximately equal in weight to that of any other citizen."); *Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 52 (1970) (Fourteenth Amendment requires district apportionment "in a manner that does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter [in the district]."); *see also generally Lockport v. Citizens for Cmty. Action*, 430 U.S. 259 (1977); *Chapman v. Meier*, 420 U.S. 1 (1975); *Gaffney v. Cummings*, 412 U.S. 735 (1973); *Burns v. Richardson*, 384 U.S. 73 (1966); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

Today, OPOV is firmly ensconced in this Court's jurisprudence. It guarantees an individual's right to an equal vote—"the right of equal participation by all voters"—and that representatives will be elected from districts containing substantially equal voting populations. *Reynolds*, 377 U.S. at 566, 577. *See also Avery v. Midland County*, 390 U.S. 474, 485-86 (1968) (applying OPOV to local government representatives);

Wesberry, 376 U.S. at 18 (applying OPOV to congressional representatives). Distilling the OPOV rulings to their essence, a citizen is deprived of his equal right to vote "if he may vote for only one representative and the voters in another district half the size are also [unduly granted the power to elect] one representative." *Bd. of Estimate*, 489 U.S. at 698.

B. Recent Section 2 Interpretations Have Undermined One-Person, One-Vote

Congress originally devised Section 2 to enforce the Fourteenth Amendment. The provision prohibited "any state or political subdivision" from imposing any electoral practice "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. §1973(a). It also enabled private litigants to invalidate laws that create racial inequality in electing representatives of their choice. 42 U.S.C. § 1973(b). "[T]he 'essence' of a Section 2 vote dilution claim is that 'a certain electoral law, practice, or structure ... cause[s] an inequality in the opportunities enjoyed by minorities to elect their preferred representatives.'" *Georgia v. Ashcroft*, 539 U.S. at 478 (citing *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)).

This Court's jurisprudence further requires that new districts drawn as a remedy for a Section 2 violation must conform to the Fourteenth Amendment. *Perry*, 132 S. Ct. at 941-42. "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race . . . and wherever their home may be in that geographical unit." *Gray*, 372 U.S. at 379. Despite that established

precedent, however, lower courts have run roughshod over this fundamental constitutional principle.

Indeed, in bending over backwards to strictly interpret Section 2, many courts have simply ignored (or been unable to reconcile) the demands of OPOV. For example, in *Benevidez v. City of Irving*, a case similar to this one, a district court relied on CVAP data showing that a Hispanic minority group could comprise a majority if a city's at-large voting scheme were abolished and thus concluded that the electoral plan violated Section 2. 638 F. Supp. 2d 709 (N.D. Tex. 2009). Yet CVAP statistics later revealed that the majority-minority districts drawn by the City of Irving after *Benavidez* violated OPOV.

This inconsistent application of CVAP data betrays the Court's rulings in *Perry* and *Gray* that districts drawn to remedy Section 2 violations must comply with the Fourteenth Amendment. Although Section 2 was created under Congress's constitutional authority to enforce voting rights, this case illustrates how the selective disregard for CVAP evidence allows courts and litigants to use Section 2 to contravene the Fourteenth Amendment. Whereas Section 2 was designed to remedy racial inequality, interpreting it without regard to CVAP evidence undermines the aims and principles of the VRA itself. Meanwhile, states' tolerance of racial inequalities and imbalances across majority-minority districts is symptomatic of the balkanization that became associated with Section 5 cases. *See, e.g.*, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). One ultimately wonders whether this transmogrified version of Section 2 strains the universal requirement of "congruence and proportionality between the injury to be prevented or remedied

and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

The Fifth Circuit recognized in 2001 that it had stumbled into this tension between Section 2 and the Fourteenth Amendment. *Chen*, 206 F.3d at 525. Instead of resolving the conflict, however, it declined to exercise its judgment. While it correctly reasoned that Section 2 litigants could use CVAP statistics to force jurisdictions to redraw majority-minority districts, *id.* at 514, the court simply deferred to the legislature's political judgment that using total population to draw districts adequately protected citizens' voting rights under OPOV, *id.* at 528. Courts have thus adopted a rule allowing litigants to use CVAP data to justify majority-minority districts but later use total-population data to shield those districts from constitutional challenge. This selective disregard for CVAP eviscerates OPOV and voter equality, principles which have become an intrinsic part of this Court's jurisprudence. Unfortunately, this result is not unique to the Fifth Circuit. The Fourth Circuit also counsels deference to the political process, *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996), while the Ninth Circuit precludes use of CVAP altogether, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1991).

But whether judicial deference or bizarre conclusions about representational equality, such rulings illustrate the substantial, unresolved conflict between Section 2 and OPOV. Courts have excused themselves from the dirty business of inquiring beyond total population when determining whether districts comply with both the Equal Protection Clause and Section 2. The divergence between total population and CVAP is the real crux of this conflict.

II. THE DIVERGENCE BETWEEN TOTAL POPULATION AND CVAP CREATED THE CONFLICT BETWEEN SECTION 2 AND THE FOURTEENTH AMENDMENT

In *Reynolds*, this Court described the core principle to guide future OPOV assessments: "The overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." 377 U.S. at 579. The *Reynolds* Court also highlighted *Gray*'s observations about the equality of *qualified* voters:

> The concept of "we the people" under the Constitution visualizes no preferred class of voters but *equality among those who meet the basic qualifications*. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

Id. at 557 (citing *Gray*, 372 U.S. at 379-380) (emphasis added).

When this Court decided *Reynolds* in 1964 it was likely unnecessary to make an explicit distinction between total-population count and CVAP count. They were essentially homologous and the implications of divergent metrics were not yet fully appreciated. Nevertheless, in this Court's only case that involved OPOV and a large population of residents ineligible to vote—military personnel and other transients who were counted in the census but not registered to vote—the Court recognized that raw population figures did not adequately measure whether the voting strength of each citizen was truly equal. *Burns v.*

Richardson, 384 U.S. 73, 96-97 (1966). Consequently, the Court held that total population is, at least in some circumstances, an insufficient metric for assessing whether a deprivation of OPOV has occurred. *Id.*

In the decade that followed, the Court recognized how changing American demographics—including the addition of resident non-voters—could definitively impact how population metrics account for voter equality under OPOV. The Court reasoned that "substantial differentials in population growth rates are striking and well-known phenomena. So, too, if it is the weight of a person's vote that matters, total population . . . may not actually reflect that body of voters whose votes must be counted and weighted for the purposes of reapportionment, because census persons are not voters." *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973). Thus, the Court recognized that total population might be an inaccurate metric when voters are not "distributed homogenously throughout the population." *Garza*, 918 F.2d at 783 (Kozinski, J., concurring in part and dissenting in part). Both *Burns* and *Gaffney* convey that the Court implicitly understood OPOV as a guarantee of voter equality and that the proper metric must reflect that concern.

Indeed, America's demographics changed substantially. Dramatic shifts in immigration patterns have heightened the population divergence in jurisdictions across the nation. Thus, as non-citizen populations spread outside traditional destinations, such as metropolitan areas in the Fifth and Ninth Circuits, it is increasingly likely that more states and localities will begin to confront the same districting problems.

Total population statistics, though imperfect and imprecise, were once a good proxy for equalizing eligible voters' voting strength because eligible voters were distributed homogenously. Given immigration trends in the half-century since the Court first articulated OPOV, however, total population is an increasingly unreliable measure of voter equality. CVAP is now easily the most precise metric courts can employ to evaluate voter equality consistent with *Reynolds*.

This case exemplifies how CVAP and total population are discordant metrics, manipulated in a fashion to undermine OPOV and deprive individual voters of their Fourteenth Amendment rights. While creating the illusion of voter equality out of numerical equality, the use of total-population counts in districts with concentrations of non-citizen residents grants voters in those districts disproportionate power.

The Texas state senate redistricting plan quickly reveals gross malapportionment. Although the 31 districts are roughly equal in terms of total population, districts like 1 and 4, where Appellants reside, deviate from the CVAP ideal by over 30% (depending on which metrics are used). Juris. Statement at 9-10. A vote cast in such a district, where there are a greater concentration of eligible voters, has much less voting power than one cast in a district with a greater concentration of non-eligible residents. Put another way, to win in District 1 or 4, a candidate must get almost twice the votes of a candidate in a district with high concentrations of voting-ineligible residents.

The CVAP deviations between Texas's senate districts plainly violate OPOV. As this Court has said, a deviation "of 10% or more is *prima facie* evidence of a OPOV violation", and requires the state to provide a

"compelling justification for the deviation." *Brown v. Thomson*, 462 U.S. 835, 852 (1983). Moreover, when population disparities exceed a certain threshold, an electoral plan becomes *per se* unconstitutional. For example, this Court concluded that a 16.4% discrepancy "may well approach tolerable limits" of what the Court might condone regardless of whether the state provided a compelling justification, establishing a baseline for what is *per se* unconstitutional." *Mahan v. Howell*, 410 U.S. 315, 329 (1973). The CVAP deviations at issue here—in the range of 30% and higher—are thus unambiguously unconstitutional.

As with the unconstitutional scheme in *Reynolds*, the Appellants' right to vote, "is simply not the same right to vote as that of those living" in districts inflated by high concentrations of non-eligible residents: "Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of those votes of those living there . . . . Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor." *Reynolds*, 377 U.S. at 563. Here, a relatively small constituency of eligible Hispanic voters in other districts have their votes "over-weighted" and "over-valuated", effectively diluting the votes of eligible voters in districts like 1 and 4. Consequently, the electoral power of voters in districts inflated by non-eligible populations is disproportionately greater than that of their neighbors in surrounding districts.

In short, the inclusion of non-citizen residents in the representational metric violates the equal protection of the laws by diluting citizen residents' relative voting power. Meanwhile, the residents in the districts with a disproportionately smaller CVAP obtain

a disproportionately greater share of representation in clear contravention of the OPOV principle.

III. THIS COURT ALONE HAS THE DUTY TO ANSWER THE QUESTION PRESENTED AND UPHOLD THE CONSTITUTIONAL PRINCIPLE OF VOTER EQUALITY

To resolve the conflict between Section 2 and the Fourteenth Amendment, the Court must move beyond the tangled web of "verbal formulations . . . to distill the theory underlying the principle of one person one vote and, on the basis of that theory, select the philosophy embodied in the Fourteenth Amendment." *Garza*, 918 F.2d at 781 (Kozinski, J., concurring in part and dissenting in part).

Although the Court never expressly stated, "what measure of the population should be used for determining whether the population is equally distributed among the districts," *Chen*, 532 U.S. at 1047 (Thomas, J., dissenting from denial of cert.), the Court's substantive insight on the meaning of OPOV parallels the principle of voter (or electoral) equality. As Judge Kozinski explained in dissenting from the Ninth Circuit's ruling on the issue that adopted a theory of "representational" equality:

> The principle of *electoral* equality assures that, regardless of the size of the whole body of constituents, political power, as defined by the number of those eligible to vote, is equalized as between districts holding the same number of representatives. It also assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location.

Garza, 918 F.2d at 782 (Kozinski, J., concurring in part and dissenting in part) (emphasis added).

Although the substantive distinction between total population and CVAP might not have been explicit in *Reynolds*, administering Section 2 in harmony with the Fourteenth Amendment requires an understanding of OPOV commensurate with the same principles of voter equality that have been consistently enunciated by this Court. Those principles resonate all too clearly with the equal protection theory that "lies at the core of OPOV." *Id.* So much of this Court's jurisprudence makes clear that the essence of OPOV is voter (or electoral) equality.

To wit, in *Burns*, the Court rejected the use of total-population counts that failed to provide accurate assessments of the relative voting strength of eligible voters. *See id.* at 784 ("*Burns* can only be explained as an application of the principle of electoral equality."). The main point of *Reynolds* bears repeating: "The overriding objective must be *substantial equality* of population among the various districts, so that the *vote of any citizen* is approximately equal in weight to that of any other *citizen* in the state." 377 U.S. at 579 (emphasis added); *see also Connor v. Finch*, 421 U.S. 407, 416 (1977) ("The Equal Protection Clause requires that legislative districts be of nearly equal population so that each person's vote may be given equal weigh in the election of representatives.").

Summarizing the themes he obse ed in this Court's jurisprudence, Judge Kozinski remarked that "a careful reading of the Court's opinions suggests that equalizing total population is not an end in itself but a means of achieving electoral equality." *Garza*, 918 F.2d at 783 (Kozinski, J., concurring in part and

dissenting in part). In other words, "total population . . . [was] only a proxy for equalizing the voting strength of eligible voters." *Id.* Even the Court's use of the term OPOV "is an important clue that [its] primary concern is with equalizing the voting power of electors, making sure that each voter gets one vote—not two, five, or ten . . . or one-half." *Id.* at 782 (citing *Reynolds*, 377 U.S. at 562). Electoral equality is thus the ultimate end: the guarantee that citizens will not have their votes diluted. When districts are drawn using total population counts that diverge from CVAP, citizens are denied electoral equality.

As *amici* noted in Part II, *supra*, CVAP and total population are incongruous standards. The use of total-population data in districts with high concentrations of voting-ineligible residents has an insidious effect. Although it creates an illusion of voter equality, it distorts the power of certain constituencies to the detriment of others—a dynamic this Court has disapproved: "We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government." *Wesberry v. Sanders*, 367 U.S. 1, 8 (1964) (also quoted in *Reynolds*, 377 U.S. at 563-564). Voter equality protects people like the Appellants, who are "shortchanged if [they] may vote for only one representative when citizens in a neighboring district, of equal population, vote for two." *Bd. of Estimate*, 489 U.S. at 698.

Instead of grappling with the challenges of determining voter equality, the Fourth and Fifth Circuits contend that courts should simply defer to the judgment of legislatures. Yet it is emphatically the province of the judiciary to say what the Constitution means. *Marbury v. Madison*, 5 U.S. (Cranch 1) 137, 177 (1803). Whether the standards formulated by states and policed by courts are constitutionally sound under the Fourteenth Amendment is a question clearly reserved to this Court.

That is, Section 5 of the Fourteenth Amendment grants Congress the power to enforce its provisions with "appropriate" legislation. Under the VRA's Section 2, states and courts may redraw districts as long as they are consistent with the Fourteenth Amendment and OPOV. When Section 2 authority is invoked to redistribute populations and redraw districts that violate OPOV, that enforcement exceeds the auspices of Section 2 and what might be deemed "congruent and proportional" under the relevant precedent. *City of Boerne*, 521 U.S. at 520.

Contrary to the Fifth Circuit's view, Congress can't define the substantive rights guaranteed by the Fourteenth Amendment. *Id.* at 519 ("The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States."). Legislation that alters the meaning of the Equal Protection Clause can't be said to be enforcing that same provision. Nor can the Texas legislature purport to say whether total-population statistics are an adequate guarantee of a principle inherent in the U.S. Constitution. *Cf. id.* ("Congress does not enforce a constitutional right by

changing what that right is. It has been given the power to enforce, not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the 'provisions of the Fourteenth Amendment.'"). Manipulating Section 2 to dilute voting power is inconsistent with the Fourteenth Amendment and therefore not an appropriate application of the *City of Boerne* enforcement power.

Judicial deference here also conflicts with *Baker v. Carr*, 369 U.S. 186 (1962). That case involved essentially a vote-dilution claim under the Equal Protection Clause. The Court found that a "citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as secured by the Constitution." *Id.* at 208.

Even in *Reynolds*, the Court plainly rejected the idea that the meaning of OPOV—an inherent Fourteenth Amendment principle—is a political question: "We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us." *Reynolds*, 377 U.S. at 567. *See also Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (deference to state power unwarranted when its exercise is a pretext for circumventing a federally protected right).

The Appellants face a quintessentially constitutional problem—the denial of equal protection—not a political one. It is unfortunate that lower courts have relegated basic constitutional rights to the realm of

political judgments. Voter equality is protected under the Fourteenth Amendment, and therefore lies squarely within the province of this Court to address.

CONCLUSION

Section 2 of the Voting Rights Act provides a constitutionally appropriate means for ensuring that any state practice that "results in a denial or abridgment of voting rights," 42 USC § 1973a, can be effectively remedied. By granting minorities the power to remedy threats to the voting franchise, Section 2—if employed properly—helps enforce the Fourteenth Amendment's promise of equal protection of the laws.

Being a creature of the Constitution, however, Section 2 can't exceed its strictures. Yet several lower courts have ratified electoral districts that violate OPOV. The ruling below, if allowed to stand, would promote a pernicious deference that abrogates voter equality.

Amici urge the Court to note probable jurisdiction and end the conflict between Section 2 and the Fourteenth Amendment by recognizing Appellants' judicially enforceable right to an equal vote and reaffirming the principle of "one-person, one vote."

Respectfully submitted,

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
One Bunker Hill Building
601 W. Fifth St., Ste. 800
Los Angeles, CA 90071
(213) 617-0414
mklausner@mac.com

Ilya Shapiro
Counsel of Record
Julio Colomba
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org
jcolomba@cato.org

March 5, 2015

Supreme Court, U.S.
FILED
MAR 6 - 2015
OFFICE OF THE CLERK

No. 14-940

IN THE
Supreme Court of the United States

SUE EVENWEL, ET AL.,
Appellants,

v.

GREG ABBOTT, ET AL.,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF APPELLANTS

Robert D. Popper
Counsel of Record
Chris Fedeli
Lauren M. Burke
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Counsel for Amici Curiae

Dated: March 6, 2015

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

REASONS FOR NOTING PROBABLE JURISDICTION 3

I. CITIZEN MALAPPORTIONMENT RAISES A JUSTICIABLE ISSUE BECAUSE IT INFLICTS A HARM THAT CANNOT BE REMEDIED BY THE POLITICAL PROCESS. 3

II. CITIZEN MALAPPORTIONMENT PRESENTS A SUBSTANTIAL AND FUNDAMENTAL CONSTITUTIONAL QUESTION WHICH SHOULD BE RESOLVED NOW.. 9

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Baker v. Carr, 369 U.S. 189 (1962) .....*passim*

Burns v. Richardson, 384 U.S. 73 (1966). 9

Bush v. Vera, 517 U.S. 952 (1996) 6

Chen v. City of Houston, 532 U.S. 1046 (2001) 9

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001) 10

Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996) 10

Davis v. Mann, 377 U.S. 678 (1964) 5

Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). 10

Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo., 397 U.S. 50 (1970) 9

Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964) 5

Reynolds v. Sims, 377 U.S. 533 (1964) ..... *passim*

Roman v. Sincock, 377 U.S. 695 (1964) 5

WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964) 5

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. XIV, § 1 2

TEX. CONST. Art. XVII, § 1. 7

TEX. CONST. Art. XVII, § 2 (repealed). 7

RULES

SUP. CT. R. 37 1

OTHER AUTHORITIES

Daniel D. Polsby and Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301 (1991) 6

Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237 (Fall 2012) 2

Henry J. Kaiser Family Foundation, *Population Distribution by Citizenship Status*, available at http://kff.org/other/state-indicator/distribution-by-citizenship-status/ 12

Illegal Immigration, Population Estimates in the United States, 1969-2011, Illegal Immigration Solutions, available at http://immigration.procon.org/view.resource.php?resourceID=000844 11

Initiative & Referendum Institute at the University of Southern California, *State I&R*, available at http://www.iandrinstitute.org/statewide_i&r.htm. 7

National Conference of State Legislatures, *Initiative, Referendum and Recall*, available at http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx 7

Nolan Malone, *et al.*, *The Foreign-Born Population: 2000*, U.S. Census Bureau (Dec. 2003), available at http://www.census.gov/prod/2003pubs/c2kbr-34.pdf 11

Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 65 (1962) 5

Yesenia D. Acosta, Luke J. Larsen, and Elizabeth M. Grieco, *Noncitizens Under Age 35: 2010–2012*, American Community Survey Briefs (Feb. 2014), available at http://www.census.gov/prod/2014pubs/acsbr12-06.pdf 11

INTERESTS OF THE *AMICI CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Amici believe that the decision by the U.S. District Court for the Western District of Texas (the "Western District") raises an important issue of constitutional law concerning reapportionment and individual voting rights which should be heard by this Court. In particular, *amici* are concerned that the Western District's ruling will allow the State of

---

[1] Pursuant to Supreme Court Rules 37.2 and 37.6, *amici* state that all parties received timely notice of the intent to file this brief, and all parties granted consent. In addition, no counsel for a party authored this brief in whole or in part; and no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

Texas intentionally to assign an unequal value to the votes of different citizens. Such a result denies Texas citizens the "one person, one vote" guarantee of the Equal Protection Clause of the Fourteenth Amendment. U.S. CONST. amend. XIV, § 1. *Amici* are troubled by the fact that Texas is devaluing the votes of certain of its citizens by improperly including noncitizen nonvoters when determining the "equal population" of legislative districts. Under federal law and the laws of all 50 states, only citizens may vote in federal elections.[2] Texas' scheme to give weight to nonvoting noncitizens along with lawful voters is contrary to the principles embodied in citizen voting laws.

SUMMARY OF ARGUMENT

The issue in this appeal is justiciable and is not reserved to the political branches. As was true with the first generation of apportionment cases resolved in the 1960s, the deliberate malapportionment of citizens at issue in this case infringes voting rights in a way that, by its nature, resists correction by the ordinary operation of democratic processes. The intervention of this Court is essential to uphold Appellants' constitutional rights.

This appeal presents a substantial and unsettled question regarding the appropriate metric to use

---

[2] *See generally* Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 ARIZ. ST. L.J. 1237, 1275-1276 (Fall 2012) ("Today, every state prohibits noncitizens from voting in federal elections. Federal law, too, prohibits aliens from voting in federal elections.").

when applying the fundamental constitutional principle of "one person, one vote." This Court's guidance is necessary to prevent the tactical, partisan use of citizen malapportionment to dilute the votes of American citizens.

For these and other reasons, *amici* urge the Court to note probable jurisdiction and set the case for oral argument.

REASONS FOR NOTING PROBABLE JURISDICTION

I. CITIZEN MALAPPORTIONMENT RAISES A JUSTICIABLE ISSUE BECAUSE IT INFLICTS A HARM THAT CANNOT BE REMEDIED BY THE POLITICAL PROCESS.

This appeal presents the Court with an opportunity to close a longstanding loophole to the "one person, one vote" principle first articulated in *Baker v. Carr*, 369 U.S. 186 (1962). Closing this loophole will prevent state legislators from deliberately disenfranchising their own citizens by a method exemplified by Texas' current Senate district plan. This method involves holding total district populations constant while varying the number of age-eligible or registered voters. More simply put, it entails the strategic placement of noncitizen populations in certain districts in order to dilute the voting power of citizen populations. This practice violates the Equal Protection Clause and this Court's precedent, and should be prohibited.

District malapportionment of any kind falls into a category of electoral violations that are justiciable precisely because they cannot be remedied by the ordinary workings of the democratic process. This Court recognized this point when it first ventured into the "political thicket" to address the equal protection implications of voting districts. *See Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

A long line of apportionment cases explicitly identified the lack of political remedies as justification for the Court's intervention. Justice Clark, concurring in *Baker v. Carr*, explained that

> the majority of the people of Tennessee have no "practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination." Tennessee has no initiative and referendum. . . . The majority of the voters have been caught up in a legislative strait jacket. . . . [T]he legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless.

369 U.S. 186, 258-59 (1962) (Clark, J. concurring); *see Reynolds*, 377 U.S. at 553-54 ("No effective political remedy to obtain relief against the alleged

malapportionment of the Alabama Legislature appears to have been available. No initiative procedure exists" and constitutional amendments require "three-fifths of the members of both houses of the legislature"); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 651-52 (1964) ("No adequate political remedy to obtain relief against alleged legislative malapportionment appears to exist in New York. No initiative procedure exists," and existing malapportionment would affect elections to any state constitutional convention); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 669-70 (1964) (several reapportionment bills "failed to pass because of opposition by legislators from the less populous counties," a constitutional amendment was "unavailable, as a practical matter" and seats at a constitutional convention "would be based on the allocation of seats in the allegedly malapportioned General Assembly."); *Davis v. Mann*, 377 U.S. 678, 689 (1964) ("No adequate political remedy to obtain legislative reapportionment appears to exist in Virginia. No initiative procedure is provided for under Virginia law."); *Roman v. Sincock*, 377 U.S. 695, 706 (1964) ("repeated attempts to reapportion the legislature or to call a constitutional convention" failed. "[n]o initiative and referendum procedure exists in Delaware," and "two-thirds of both houses of two consecutive state legislatures is required in order to amend the State Constitution."); *see* Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 65, 79 (1962) ("The problem of malapportionment is one which peculiarly fits such a judicial role. For the usual methods by which a

majority can constitutionally gain its ends are blocked.").

The "citizen malapportionment" at issue in this case has the same characteristics as the general malapportionment at issue in *Baker* and its progeny, and judicial intervention is justified here on the same grounds. The creation of districts with massively unequal populations of age-eligible or registered voters (albeit with the same total populations) allows legislators to "weight" the votes of their supporters by placing them in districts with fewer voting citizens. Legislators thereby acquire the undemocratic ability to increase their odds of winning elections *without* having actually to appeal to voters. Indeed, legislators gain the ability to choose themselves, at least to some degree; and they acquire this power at the voters' expense.[3]

Like the first generation of malapportionment claims addressed in *Baker*, citizen

---

[3] The pathology and illegitimacy of "self-constitutive" assemblies was discussed in the context of gerrymandering in Daniel D. Polsby and Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 305 (1991) ("The members of a partially self-constituted legislature depend to a degree upon one another rather than upon their constituents for their tenure in office. Whatever 'representation' means, it cannot possibly mean that."). *See also Bush v. Vera*, 517 U.S. 952, 963 (1996) (the result of districts drawn to protect incumbents "seems not one in which the people select their representatives, but in which the representatives have selected the people.") (citation omitted).

malapportionment systematically distorts the outcomes of elections and so is immune to correction through normal democratic processes. Legislators who depend for their electoral success on the "weighted" or "privileged" votes of their specially distributed partisans cannot be expected ever to equalize that distribution.

As was true in Tennessee in 1962 and in Alabama, New York, Maryland, Virginia, Delaware, and other states in 1964, voters in Texas currently have no effective political remedy. Texas has no initiative process.[4] Any proposed amendment to the Texas Constitution requires a legislative referral approved by a supermajority of two-thirds of both houses. TEX. CONST. Art. XVII, § 1. Texas' provision for calling a constitutional convention was repealed in 1999. TEX. CONST. Art. XVII, § 2 (repealed).

This case presents a justiciable question which requires this Court's involvement. As in 1962 and 1964, judicial intervention is necessary to correct an electoral imbalance that will not be fixed by holding elections.

This imbalance inflicts a grave constitutional injury. Texas created districts that are equal in total population but decidedly unequal in citizen

---

[4] *See* National Conference of State Legislatures, *Initiative, Referendum and Recall*, available at http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx (visited March 5, 2015); Initiative & Referendum Institute at the University of Southern California, *State I&R*, available at http://www.iandrinstitute.org/statewide_i&r.htm (visited March 5, 2015).

population. As a result, Texas' apportionment effectively gives some of its citizens approximately 1.8 votes while others have only 1 vote. *See* Jurisdictional Statement ("Juris. Stmnt."), No. 14-940 (Feb. 2, 2015) at 9 (showing a maximum voting power discrepancy of 1 to 1.84). The nature of the injury here was well described by this Court on another occasion:

> [I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. . . . Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State.

Reynolds, 377 U.S. at 532-33. As the Court concluded, "[w]eighting the votes of citizens differently, *by any method or means*, merely because

of where they happen to reside, hardly seems justifiable." *Id.* at 533 (emphasis added).

II. CITIZEN MALAPPORTIONMENT PRESENTS A SUBSTANTIAL AND FUNDAMENTAL CONSTITUTIONAL QUESTION WHICH SHOULD BE RESOLVED NOW.

As Appellants have demonstrated, this case presents a substantial question. This Court should note probable jurisdiction and set this case for oral argument. *See* Juris. Stmnt. at 12-16.

Indeed, this case would satisfy even the higher standard used for certiorari. *Id.* at 16-25. Since this Court first considered the issue of the appropriate metric for the "one person, one vote" standard almost 50 years ago, the issue has remained controversial. *See Burns v. Richardson*, 384 U.S. 73 (1966). Subsequent precedent suggests that the issue of the proper population measure has not been clearly resolved. *See Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 58 n.9 (1970); *Chen v. City of Houston*, 532 U.S. 1046, 1047 (2001) (Thomas, J. dissenting from denial of certiorari) ("Having read the Equal Protection Clause to include a 'one-person, one-vote' requirement . . . we have left a critical variable in the requirement undefined. We have never determined the relevant 'population' that States and localities must equally distribute among their districts.").

The Fifth Circuit, while acknowledging that the "propriety under the Equal Protection Clause of using total population rather than a measure of potential voters . . . presents a close question," concluded that, given "the lack of more definitive guidance from the Supreme Court . . . this eminently political question has been left to the political process." *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001); *accord, Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996) ("In the absence of a clear pronouncement from the Supreme Court on this issue," North Carolina could choose total population and "the district court should have respected its choice"). By contrast, the Ninth Circuit treated the issue as justiciable but held that the "one person, one vote" principle *requires* the use of total population. *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). Yet Judge Kozinski, in a separate opinion, argued strongly that voter population was the appropriate standard instead. *Id.* at 782 (Kozinski, J., concurring in part and dissenting in part).

This critical issue at the heart of this Court's Equal Protection jurisprudence should be finally and unambiguously resolved. Indeed, this issue is more pressing than it was when *Chen* and *Garza* were decided, given the considerable growth in the noncitizen population.

Noncitizen populations in the U.S. are significantly larger today, especially in Texas. The number of unlawfully present aliens has nearly

tripled in the U.S. since *Garza*, from approximately 3.4 million in 1992 to 11.5 million in 2011.[5] Furthermore, in 1990 there were approximately 11 million total noncitizens living in the U.S. (including both legal residents and unlawfully present) or about 4.4 percent of the U.S. total 1990 population of approximately 248 million.[6] In contrast, by 2012 this figure had doubled to approximately 22 million noncitizens in the U.S.[7] Out of a total 2012 population of 311 million, this means that roughly 7 percent of the modern U.S. population lacks citizenship – or about 1 in 14 people. This is a substantial increase in the past 25 years. Furthermore, it is well established that Texas has one of the highest noncitizen populations in the United States, at 11 percent of its total state

---

[5] *Illegal Immigration, Population Estimates in the United States, 1969-2011*, Illegal Immigration Solutions, available at http://immigration.procon.org/view.resource.php?resourceID=000844 (visited March 5, 2015).

[6] Nolan Malone, *et al.*, *The Foreign-Born Population: 2000*, U.S. Census Bureau (Dec. 2003), page 3, Table 1, available at http://www.census.gov/prod/2003pubs/c2kbr-34.pdf (showing noncitizens accounted for 59.5 percent of the United States' total foreign-born population of 19,767,316, which translates as approximately 11,761,553 noncitizens, or about 4.4 of the U.S. total 1990 population of 248,709,873).

[7] Yesenia D. Acosta, Luke J. Larsen, and Elizabeth M. Grieco, *Noncitizens Under Age 35: 2010–2012*, American Community Survey Briefs, p. 2 (Feb. 2014), available at http://www.census.gov/prod/2014pubs/acsbr12-06.pdf.

population – tied for second in the U.S., behind only California.[8]

Accordingly, the opportunity for legislators to resort to the tactical use of noncitizen populations to dilute the voting power of citizens is greater than ever.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court note probable jurisdiction and set this case for oral argument.

Respectfully submitted,

Robert D. Popper
Counsel of Record
Chris Fedeli
Lauren M. Burke
JUDICIAL WATCH, INC.
425 Third Street SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Counsel for Amici Curiae

March 6, 2015

---

[8] *See* Henry J. Kaiser Family Foundation, *Population Distribution by Citizenship Status*, available at http://kff.org/other/state-indicator/distribution-by-citizenship-status/ (visited March 5, 2015).

No. 14-940

In The
Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

STEVEN J. LECHNER
Counsel of Record
JEFFREY W. MCCOY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
jmccoy@mountainstateslegal.com

Attorneys for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that the Equal Protection Clause of the Fourteenth Amendment includes a "one person, one vote" principle. This principle requires that, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970). In 2013, the Texas Legislature enacted a State Senate map ("Plan S172") creating districts that, while roughly equal in terms of total population, grossly malapportioned voters. Appellants, who live in Senate districts significantly overpopulated with voters, brought a "one person, one vote" challenge, which the three-judge district court below dismissed for failure to state a claim. The district court held that Appellants' constitutional challenge is a judicially unreviewable political question.

The question presented is whether the "one person, one vote" principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT	1
IDENTITY AND INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. THE RIGHT TO VOTE IS ONE OF THE MOST FUNDAMENTAL RIGHTS AND A COURT MUST STRICTLY SCRUTINIZE A DISTRICTING SCHEME THAT DIMINISHES THAT RIGHT	4
II. THE FUNDAMENTAL RIGHT TO VOTE CANNOT BE DIMINISHED SOLELY BASED ON WHERE ONE LIVES	6
III. BECAUSE THE RIGHT TO VOTE BELONGS TO CITIZENS, THE FOURTEENTH AMENDMENT MUST PROTECT ELECTORAL EQUALITY OF CITIZENS	10
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors v. Peña, 515 U.S. 200 (1995) 2

Barnett v. City of Chicago, 141 F.3d 699 (7th Cir. 1998) 14, 15, 16

Bartlett v. Strickland, 556 U.S. 1 (2009) 16, 17

Bd. of Estimate of City of New York v. Morris, 489 U.S. 688 (1989) 5, 12

Brown v. Thomson, 462 U.S. 835 (1983) 9

Burns v. Richardson, 384 U.S. 73 (1966) 10, 13

Campos v. City of Houston, 113 F.3d 544 (5th Cir. 1997) 14, 18

Chapman v. Meier, 420 U.S. 1 (1975) 5, 12

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000) 18

Chen v. City of Houston, 121 S. Ct. 2020 (2001) 11

Concrete Works of Colorado, Inc. v. City & County of Denver, 321 F.3d 950 (10th Cir. 2003) 2

Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996) 18

Dunn v. Blumstein, 405 U.S. 330 (1972) 4

Garza v. Cnty. of Los Angeles, 918 F.2d 763 (9th Cir. 1990) 8, 11, 17, 18

Ga. State Conference of NAACP v. Fayette Cnty. Bd. of Comm'rs, 775 F.3d 1336 (11th Cir. 2015) 17

TABLE OF AUTHORITIES – Continued

Page

Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984) 18

Gray v. Sanders, 372 U.S. 368 (1963) ..... *passim*

Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo., 397 U.S. 50 (1970) ..... i, 4, 10, 12

Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) 4, 6, 12

Hicks v. Miranda, 422 U.S. 332 (1975) 19

Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) 6

Lockport v. Citizens for Community Action, 430 U.S. 259 (1977) 5, 12

Negron v. City of Miami Beach, 113 F.3d 1563 (11th Cir. 1997) 14, 15

Pope v. County of Albany, 687 F.3d 565 (2d Cir. 2012) 16

Reyes v. City of Farmers Branch, 586 F.3d 1019 (5th Cir. 2009) 16, 17

Reynolds v. Sims, 377 U.S. 533 (1964) ..... *passim*

Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989) 14, 18

Thornburg v. Gingles, 478 U.S. 30 (1986) 13, 14

Townsend v. Holman Consulting Corp., 929 F.2d 1358 (9th Cir. 1990) 14

Wesberry v. Sanders, 376 U.S. 1 (1964) 4, 9

TABLE OF AUTHORITIES – Continued

Page

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) 2

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 4

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV ..... *passim*

U.S. Const. amend. XV 14

U.S. Const. amend. XV, § 1 14

STATUTES

Voting Rights Act, Section 2, 42 U.S.C. § 1973 .... *passim*

RULES

Supreme Court Rule 37.2 1

Supreme Court Rule 37.2(a) 1

OTHER AUTHORITIES

U.S. Census Bureau, *American Community* Survey, *available at* http://www.census.gov/acs/www/about_the_survey/american_community_survey/ (last visited January 28, 2013) 10

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS' JURISDICTIONAL STATEMENT

Pursuant to Supreme Court Rule 37.2, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Appellants.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside and work in every State. Since its creation in 1977, MSLF attorneys have defended individual liberties and sought to ensure "equal protection of the laws."

[1] Pursuant to Supreme Court Rule 37.2(a), notice of MSLF's intent to file this amicus curiae brief was received by counsel of record for all parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this amicus curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

E.g., *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); *Concrete Works of Colorado, Inc. v. City & County of Denver*, 321 F.3d 950 (10th Cir. 2003). Accordingly, MSLF brings a unique perspective to this case and believes that its amicus curiae brief will assist this Court in deciding this case.

SUMMARY OF THE ARGUMENT

This Court should note probable jurisdiction because the issue of what the "one person, one vote" principle requires raises a substantial question. The right to vote is a fundamental right and this Court has repeatedly held that an individual's right to vote cannot be diminished solely based on where he or she lives. Accordingly, it is this Court's responsibility to scrutinize any districting scheme that may dilute the voting power of a citizen.

The three-judge panel of the district court failed to strictly scrutinize Plan S172, the redistricting scheme at issue in this case. Although Plan S172 proportions Texas State Senate districts relatively equally by total population, the number of citizens in each district is extremely disproportionate. For example, Senate District 1, where Appellant Sue Evenwel lives, has 573,895 citizens of voting age, which is over 200,000 more than the senate district with the fewest number of adult citizens. Senate District 4, where Appellant Edward Pfenninger lives, has 533,010

citizens of voting age, over 160,000 more than the senate district with the fewest number of adult citizens. Therefore, candidates from Districts 1 and 4 need significantly more votes to guarantee an election than candidates from the district with the fewest number of citizens. This results in the citizens of Appellants' districts having less electoral power than citizens in districts where fewer votes are required to elect a senator. This Court, however, has repeatedly stated that a citizen's voting power cannot be determined solely based on where an individual lives. Accordingly, this Court should note probable jurisdiction in order to protect the right to vote of all Texas citizens.

Although this Court has never expressly stated that the Fourteenth Amendment requires governments to apportion districts based on the number of citizens in each district, the principle of electoral equality of citizens is at the core of nearly all of this Court's "one person, one vote" cases. The principle of electoral equality recognizes that persons eligible to vote hold the ultimate political power in our democracy, and is served by apportionment by proportion of eligible voters, not total population. This Court should note probable jurisdiction in order to reaffirm the principle of electoral equality of citizens and clarify that states must apportion districts by citizen voting age population, rather than total population.

ARGUMENT

I. THE RIGHT TO VOTE IS ONE OF THE MOST FUNDAMENTAL RIGHTS AND A COURT MUST STRICTLY SCRUTINIZE A DISTRICTING SCHEME THAT DIMINISHES THAT RIGHT.

The appeal raises a substantial question because the right to vote is a fundamental right that this Court has an obligation to protect. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). A citizen thus "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.").

This Court has made clear that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966). In order to be consistent with the Equal Protection Clause, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley*,

397 U.S. at 56. Specifically, states must apportion districts in a manner that provides proportionate voting strength for the electors in each district. *Chapman v. Meier*, 420 U.S. 1, 24 (1975) ("All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group."); *Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 (1977) ("[I]n voting for their legislators, all citizens have an equal interest in representative democracy, and . . . the concept of equal protection therefore requires that their votes be given equal weight.").

This Court's precedent makes clear that:

> The personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating his power to determine the outcome of an election, shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or to put it another way, if he may vote for one representative and the voters in another district half the size also elect one representative.

Bd. of Estimate of City of New York v. Morris, 489 U.S. 688, 698 (1989). Therefore, a redistricting scheme that dilutes the voting power of citizens in certain districts violates an individual's fundamental right to vote and is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

Furthermore, because the right to vote is a fundamental right, a statute that diminishes the right to vote must be strictly scrutinized. *Harper*, 383 U.S. at 670 ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) ("[S]tate apportionment statutes, which may dilute the effectiveness of some citizens' votes, receive close scrutiny from this Court." (citation omitted)). The district court, however, failed to strictly scrutinize Plan S172. *See* Appx. at 13a-14a. Instead, the district court dismissed the Appellants' complaint without examining the effects of Plan S172 on individual voters' voting strength. *Id.* The district court's approach is inconsistent with this Court's precedent and the requirements of the Fourteenth Amendment. Accordingly, this Court should note probable jurisdiction in order to reaffirm that courts must strictly scrutinize districting schemes.

II. THE FUNDAMENTAL RIGHT TO VOTE CANNOT BE DIMINISHED SOLELY BASED ON WHERE ONE LIVES.

This Court should also note probable jurisdiction to reaffirm the cardinal principle that one's voting power cannot be diminished solely because of where he or she lives. In *Gray*, this Court held that "[t]he conception of political equality from the Declaration

of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote." 372 U.S. at 381. This Court reasoned that "[h]ow then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?" *Id.* at 379. In order to prevent this vote dilution, and ensure equal participation in the electoral process the Equal Protection Clause guarantees that "[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote – whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Id.*

One year later, this Court made it clear that "right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds*, 377 U.S. at 555. In *Reynolds*, residents of Jefferson County, Alabama, challenged the apportionment of seats in the Alabama Legislature. *Id.* at 540. Specifically, the plaintiffs alleged that, due to uneven growth in population in certain districts, the failure to reapportion representatives in nearly sixty years diluted the voting power of some voters. *Id.* Relying on the reasoning in *Gray*, this Court reaffirmed the principle that "voters cannot be classified, constitutionally, on the basis of where they

live." *Id.* at 565. As a result, the Court held that the Constitution required Alabama to reapportion its districts because "[t]he fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote." *Id.* at 567.

Like *Gray* and *Reynolds*, Plan S172 dilutes the value of votes based solely on where a voter lives. Before the three-judge court, Appellants demonstrated that the redistricting scheme dilutes the votes of those living in Appellants' districts because there are substantially more citizens and registered voters in those districts than in other districts. *See* Appx. 27a-30a. For example, Senate District 1, where Plaintiff Sue Evenwel lives, has 573,895 citizens of voting age, which is over 200,000 more than the senate district with the fewest number of adult citizens. Appx. 28a. Therefore, in order to be guaranteed a seat in the State Senate, a candidate from District 1 would need to receive 286,947 votes. A candidate from the district with the fewest number of citizens, however, can be elected with only 186,211 votes, which is "less than the *difference* [in number of citizens] between the two districts." *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 780 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) (emphasis in original).

Senate District 4, where Plaintiff Edward Pfenninger lives, has 533,010 citizens of voting age, over 160,000 more than the senate district with the fewest number of adult citizens Appx. 30a. Although not as disproportionate as Senate District 1, Senate District 4 still requires more votes to guarantee a

candidate's election than in the low district.[2] But as this Court said in *Reynolds*, "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." 377 U.S. at 563; *Wesberry*, 376 U.S. at 8 ("To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People.'"). Instead, the Fourteenth Amendment requires that "all voters, as citizens of a State, stand in the same relation regardless of where they live." *Reynolds*, 377 U.S. at 565. "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State." *Id.* at 568.

Plan S172 impairs the right to vote of the voters living in Senate Districts 1 and 4 by diluting the effectiveness of their votes. As this Court has made clear, such an apportioning scheme violates the Equal Protection Clause of the Fourteenth Amendment. "[T]he basic principle of representative government

---

[2] At the very least, this deviation is prima facie evidence that the redistricting scheme is diluting the effectiveness of Appellants' votes. *See Brown v. Thomson*, 462 U.S. 835, 852 (1983) ("We have come to establish a rough threshold of 10% maximum deviation from equality . . . below that level, deviations will ordinarily be considered de minimis.").

remains, and must remain, unchanged – the weight of a citizen's vote cannot be made to depend on where he lives." *Reynolds*, 377 U.S. at 567. Accordingly, this Court should note probable jurisdiction in order to ensure that all Texas voters have an equal voice in their government.

III. BECAUSE THE RIGHT TO VOTE BELONGS TO CITIZENS, THE FOURTEENTH AMENDMENT MUST PROTECT ELECTORAL EQUALITY OF CITIZENS.

This Court has repeatedly held that the right to vote is diminished when a citizen's voting power is diluted solely based on where he or she lives. *Reynolds*, 377 U.S. at 567. This Court, however, has never expressly articulated that voting districts must be apportioned based on the Citizen Voting Age Population ("CVAP")[3] of each district. In fact, it appears that this Court has left open the question of what population base a state must use when apportioning districts. *Burns v. Richardson*, 384 U.S. 73, 91 (1966) (Stating that the Court "carefully left open the question what population" base should be used when apportioning districts.); *Hadley*, 397 U.S. at 58

---

[3] The U.S. Census Bureau estimates CVAP through its ongoing American Community Survey. *See* U.S. Census Bureau, *American Community* Survey, *available at* http://www.census.gov/acs/www/about_the_survey/american_community_survey/ (last visited January 28, 2013).

n.9 (Stating that there was "no need to decide" the question of what population should be used when apportioning districts "at this time. . . ."). This Court should note probable jurisdiction in order to clarify that, because the right to vote is a right belonging to citizens, states must apportion districts based on CVAP. By leaving open the question, the Court has "left a critical variable in the [one person, one vote] requirement undefined." *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001) (Thomas, J., dissenting from the denial of certiorari).

This Court's opinions set out a long-standing principle that the "one person, one vote" principle of the Fourteenth Amendment protects the electoral equality of citizens. "Citizens, not history or economic interests, cast votes." *Reynolds*, 377 U.S. at 580. As Judge Kozinski said in his opinion in *Garza*, "[i]t is very difficult . . . to read the Supreme Court's pronouncements in this area without concluding that what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation." 918 F.2d at 782 (Kozinski, J., concurring in part and dissenting in part). The principle of electoral equality recognizes that persons eligible to vote "hold the ultimate political power in our democracy," and is served by apportionment by proportion of eligible voters. *Id.* at 781.

As demonstrated above, this Court's decisions recognize that the right to vote is a fundamental right held by citizens, and the right to vote is diminished

when "the votes of *citizens*" are weighed "differently, by any method or means." *Reynolds*, 377 U.S. at 563 (emphasis added). The justification for this Court's holding in *Reynolds* was that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." *Id.* at 567, 84 S.Ct. at 1384. The principle of electoral equality was also reflected in nearly all of this Court's "one person, one vote" cases. *See Gray*, 372 U.S. at 381 ("[O]nce the class of voters is chosen and their qualifications specified, we see no constitutional way by which *equality of voting power* may be evaded." (emphasis added)); *Morris*, 489 U.S. at 698 ("a *citizen* is . . . shortchanged if he may vote for only one representative when *citizens* in a neighboring district, of equal population, vote for two. . . ." (all emphasis added)); *Harper*, 383 U.S. at 668 ("The principle that denies the State the right to dilute a *citizen's vote* on account of his economic status or other such factors by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay." (emphasis added)); *Chapman*, 420 U.S. at 24 ("All *citizens* are affected when an apportionment plan provides disproportionate voting strength. . . ." (emphasis added)); *Lockport*, 430 U.S. at 265 ("[A]ll *citizens* have an equal interest in representative democracy, and . . . the concept of equal protection therefore requires that *their votes* be given equal weight." (all emphasis added)). *Hadley*, 397 U.S. at 52 ("[A] *qualified voter* has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted." (emphasis added)).

Even *Burns*, wherein this Court stated that the question of relevant population base was left open, reaffirms the principle of electoral equality. 384 U.S. at 91. In that case, this Court upheld a Hawaii State House redistricting plan that apportioned representatives by voter registration statistics rather than total population. *Id.* at 90. Hawaii adopted this plan because the large population of military personnel and tourists resulted in a large number of non-voters on Oahu. *Id.* at 94. The Court upheld Hawaii's decision to rely on voter population to apportion districts because "[t]otal population figures may thus constitute a substantially distorted reflection of the distribution of state citizenry." *Id.* When this Court's Equal Protection Clause cases are read together, it is clear that the Constitution prevents redistricting plans that result in disproportionate electoral power.

The principle of electoral equality is also reflected in this Court's cases involving Section 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973. In *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986), this Court suggested that vote dilution under Section 2 of the VRA should be examined by looking at the number of eligible voters in an area. This Court emphasized that courts must look to voting power of racial groups in order to determine whether a government has unlawfully diluted their right to vote. *Id.* at 49-51. Thus, *Gingles* suggested that voters are the relevant

demographic for courts to look at when determining whether vote dilution has occurred.[4]

As a result of *Gingles*, most circuits recognize the principle of electoral equality when analyzing vote dilution under Section 2 of the Voting Rights Act. *See Barnett v. City of Chicago*, 141 F.3d 699, 704-05 (7th Cir. 1998); *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1567-69 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1418-28 (9th Cir. 1989), *abrogated on other grounds by Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990). For example, in *Negron*, the Eleventh Circuit reasoned that:

> In order to elect a representative or have a meaningful potential to do so, a minority group must be composed of a sufficient

---

[4] Although the Voting Rights Act enforces the Fifteenth Amendment, there is not a fundamental difference between the right to vote protected by the Fifteenth Amendment and the right to vote protected by the Equal Protection Clause of the Fourteenth Amendment. *Reynolds*, 377 U.S. at 557-58 ("[A]ll who participate in the election are to have an equal vote – whatever their race. . . ."); U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."). Both amendments ensure that citizens have relatively equal voting power when electing representatives. *See Gray*, 372 U.S. at 381 (Comparing the "conception of political equality" in the Fourteenth and Fifteenth Amendments.).

> number of voters or of those who can readily become voters through the simple step of registering to vote. In order to vote or to register to vote, one must be a citizen.

113 F.3d at 1569. Since voting power can only come from those eligible to vote, the Eleventh Circuit held that CVAP was the relevant statistic for a court to determine whether a minority group's right to vote had been unlawfully diluted. *Id.* at 1569.[5]

The Seventh Circuit, in *Barnett*, expanded the reasoning of *Negron* and stated that:

> Neither the census nor any other policy or practice suggests that Congress wants noncitizens to participate in the electoral system as fully as the concept of virtual representation would allow, although permanent resident aliens are permitted to make federal campaign contributions, 2 U.S.C. § 441e, as are certain other nonvoters.

141 F.3d at 704. Because "[t]he right to vote is one of the badges of citizenship. The dignity and very concept of citizenship are diluted if noncitizens are allowed to vote either directly or by the conferral of additional voting power on citizens believed to have a community of interest with the noncitizens."

---

[5] The Eleventh Circuit clarified that the use of CVAP is necessary "only where there is reliable information indicating a significant difference in citizenship rates between the majority and minority populations." *Id.* at 1569.

Id. As a result, the Seventh Circuit agreed that "citizen voting-age population is the basis for determining equality of voting power." *Id.*

In 2009, this Court once again examined the issue of what metric to use to determine vote dilution in VRA Section 2 cases. *Bartlett v. Strickland*, 556 U.S. 1 (2009). In *Bartlett*, a plurality of this Court stated that courts examining Section 2 claims must determine if "minorities make up more than 50 percent of the voting-age population in the relevant geographic area[.]" *Id.* at 18 (plurality opinion). Although this wording implies that courts should look at voting age population ("VAP"), rather than CVAP, to determine if there is vote dilution, the opinion also made reference to CVAP and, more importantly, reaffirmed the principle of electoral equality.[6] *Id.* at 19 ("The special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district.").

Only two circuits have examined the issue after *Bartlett*. *See Reyes v. City of Farmers Branch*, 586 F.3d 1019 (5th Cir. 2009); *Pope v. County of*

---

[6] Furthermore, it appears that there was not a significant difference between the voting age population and the citizen voting age population in *Bartlett*. *Id.* at 9.

Albany, 687 F.3d 565 (2d Cir. 2012).[7] In *Reyes*, the Fifth Circuit held that *Bartlett* did not require courts to abandon CVAP as the proper metric for determining minority vote dilution. 586 F.3d at 1023-24. In *Pope*, the Second Circuit used VAP to determine whether a VRA Section 2 violation had occurred, but the court noted that both parties relied on VAP and, as a result, the Court did not have to examine the issue of CVAP. 687 F.3d at 573 n.6. Therefore, for the most part, the courts of appeals have consistently held that CVAP is the proper metric to use to determine whether vote dilution has occurred in VRA Section 2 cases. In these cases, the circuits recognize that the principle of electoral equality is a necessary aspect of the fundamental right to vote.

The Circuit Courts, however, have taken a different view when it comes to vote dilution under the "one person, one vote" principle. The Ninth Circuit has held that the "one person, one vote" principle requires voting districts to be divided by total population. *Garza*, 918 F.2d at 773-76. Astonishingly, the court expressly rejected the principle of electoral equality and stated that using CVAP would "dilute

---

[7] The Eleventh Circuit also recently decided an appeal in a VRA Section 2 case. *Ga. State Conference of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1339 (11th Cir. 2015). The court, however, did not "address any issues related to the merits" and instead held that the district court's granting of a motion for summary judgment was improper and remanded the case to the district court for trial. *Id.* at 1348-49.

the access of voting age citizens in that district to their representative." *Id.* at 775; *but see Romero*, 883 F.2d 1418, 1426 (citing *Gingles v. Edmisten*, 590 F. Supp. 345, 381 (E.D.N.C. 1984), for the proposition that "for purposes of determining minority vote dilution, 'effective voting majority' [is the] appropriate standard").

Similarly, the Fifth Circuit views vote dilution differently in "one person, one vote" cases. *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). Although the court did not hold that the Fourteenth Amendment requires voting districts to be divided by total population, it did reject plaintiffs' argument that "[s]ince [a 'one person, one vote'] inquiry focuses on the dilution of *votes*, it would be improper to allow the votes of two adult citizens to be weighed equally with the vote of a single adult citizen merely because the latter happened to live in proximity to a noncitizen ineligible to vote." *Id.* at 523 (emphasis in original). Instead, the court ruled that "the choice of population figures is a choice left to the political process." *Id.* The court ruled this way despite stating, three years earlier, that CVAP must be used for VRA Section 2 claims because "only voting-age persons who are United States citizens can vote." *Campos*, 113 F.3d at 548.[8]

---

[8] The Fourth Circuit has also held that the "one person, one vote" does not require voting districts to be divided in a certain way. *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996). Although the Fourth Circuit did not contradict itself regarding the principle of electoral equality in VRA Section 2 cases, its decision

(Continued on following page)

Although the circuits have consistently used CVAP when analyzing vote dilution under the VRA, no circuit has held that CVAP is the proper metric to use to determine whether a government has diluted a citizen's vote under the "one person, one vote" principle. The latter holdings are inconsistent with both this Court's Fourteenth Amendment and VRA cases, which consistently reflect the principle of electoral equality. This Court should note probable jurisdiction in order to clarify that the Fourteenth Amendment protects the electoral equality of citizens.

CONCLUSION

As demonstrated above, this Court has repeatedly protected the fundamental right to vote of all citizens by ensuring that each citizen has the same electoral power as other citizens, regardless of where he or she lives. The district court failed to adequately protect the right to vote of all Texas voters and its decision diminishes the voting power of citizens in Appellants' districts. In order to ensure that no individual's right to vote is diminished, this Court should note probable jurisdiction and set the case for oral argument. *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (This Court has "no discretion to refuse adjudication of the case on its merits as would have

---

still adds to the uncertainty of how to properly protect the right to vote from vote dilution.

been true had the case been brought here under our certiorari jurisdiction.").

Dated this 6th day of March 2015.

Respectfully submitted,

STEVEN J. LECHNER
Counsel of Record
JEFFREY W. MCCOY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
jmccoy@mountainstateslegal.com

Attorneys for Amicus Curiae

Supreme Court, U.S.
FILED
MAR 6 - 2015
OFFICE OF THE CLERK

No. 14-940

In The
Supreme Court of the United States

SUE EVENWEL, EDWARD PFENNINGER,
Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS
GOVERNOR OF TEXAS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF *AMICUS CURIAE* SOUTHEASTERN LEGAL FOUNDATION SUPPORTING APPELLANTS

BRADLEY A. BENBROOK
STEPHEN M. DUVERNAY
Benbrook Law Group, PC
400 Capitol Mall, Ste. 1610
Sacramento, CA 95814
(916) 447-4900
brad@benbrooklawgroup.com

SHANNON LEE GOESSLING
Counsel of Record
Southeastern Legal Foundation
2255 Sewell Mill Road, Ste. 320
Marietta, GA 30062
(770) 977-2131
shannon@southeasternlegal.org

March 2015

Counsel for Amicus Curiae

QUESTION PRESENTED

Do voters still have an enforceable vote-dilution claim under the Fourteenth Amendment when their legislature dilutes the power of their vote by as much as 50% compared to other voters in nearby districts as a result of drawing state legislative districts strictly on the basis of population?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. The Question Presented Is Substantial, And Now Is The Right Time To Answer It	4
II. "Equal Representation" Interests Should Not Trump Electoral Equality In Disputes Over Non-Congressional Districts	8
III. Technology May Have Rendered The Supposed Choice Between Population Equality And Voting Equality A False One	14
CONCLUSION	17

TABLE OF AUTHORITIES

Cases — Page

Baker v. Carr,
369 U.S. 186 (1962) 2, 15

Burns v. Richardson,
384 U.S. 73 (1966) 12

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2000) ..... passim

Daly v. Hunt,
93 F.3d 1212 (4th Cir. 1996) 4, 13

Davis v. Bandemer,
478 U.S. 109 (1986) 15

Gaffney v. Cummings,
412 U.S. 735 (1973) 7

Garza v. County of Los Angeles,
918 F. 2d 763 (9th Cir. 1990) ..... passim

Hadley v. Jr. College Dist. Of Metro. Kansas City, Missouri,
397 U.S. 50 (1970) 7, 12

Hicks v. Miranda,
422 U.S. 332 (1975) 4

Karcher v. Daggett,
462 U.S. 725 (1983) 14, 15

Kirkpatrick v. Priesler,
394 U.S. 526 (1969) 11

Page

Mahan v. Howell,
410 U.S. 315 (1973) 7

Reynolds v. Sims,
377 U.S. 533 (1964) ..... passim

Vieth v. Jubelirer,
541 U.S. 267 (2004) 15

Wesberry v. Sanders,
376 U.S. 1 (1964) 10, 11, 14, 15

Zivotofsky ex rel. Zivotofsky v. Clinton,
132 S. Ct. 1421 (2012) 13

Other Authorities

Bryan Baker & Nancy Rytina,
Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012 6

Jeffrey S. Passel & D'Vera Cohn,
Pew Hispanic Center *Unauthorized Immigrant Population: National and State Trends, 2010* (Feb. 1, 2011) 6

Krabill & Fielding,
No More Weighting: One Person, One Vote Means One Person, One Vote,
16 Tex. Rev. L. & Pol. 275 (Spring 2012) 5

Page

Micah Altman & Michael McDonald,
The Promise & Perils of Computers in Redistricting,
Duke J. Const. L. & Pub. Pol'y 79 (2010).....16

Micah Altman, et al.,
Pushbutton Gerrymanders? How Computing Has Changed Redistricting in *Party Lines: Competition, Partisanship, and Congressional Redistricting* (Thomas E. Mann & Bruce E. Cain eds. 2005).....16

Pamela S. Karlan,
The Fire Next Time: Reapportionment After the 2000 Census, 50 Stan. L.Rev. 731 (1998).....15

Richard H. Pildes,
Principled Limitations on Racial and Partisan Redistricting, 106 Yale L.J. 2505 (1997).....16

INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. SLF drafts legislative models, educates the public on important policy issues, and litigates regularly before the Supreme Court of the United States, including such cases as *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Northwest Austin Municipal Utility District No. One* v. *Holder*, 557 U.S. 193 (2009); *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000); and *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989).

In particular, SLF advocates for a color-blind interpretation of the Constitution, protection of all qualified voters' constitutional right to vote and preservation of the one-person, one-vote principle guaranteed by the Equal Protection Clause of the Fourteenth Amendment. This case is important to SLF because it threatens to erode the one-person, one-vote principle by allowing state legislatures to focus only on the equalization of

---

[1] SLF hereby represents that all parties have been notified of and consented to the filing of this brief. Their letters of consent have been filed with the Clerk pursuant to Rule 36. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution to its preparation or submission.

state legislative districts by population as the ultimate goal of redistricting, without regard to the effect such population-balancing has on citizens' voting power—even when, as here, it results in substantial vote dilution.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since *Baker v. Carr*, 369 U.S. 186 (1962), the Court has repeatedly made room on its docket for cases that instruct lower courts on implementing the one-person, one-vote principle. *Reynolds v. Sims*, 377 U.S. 533, 567 (1964), established that "the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives." When it comes to establishing legislative district lines at the state level, "[w]hatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, *so that* the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579 (emphasis added).

For decades following *Reynolds*, states could safely assume that balancing population served the ultimate goal of achieving substantially equal voting strength among districts. In many states now, that assumption is no longer valid in light of the increased presence of people ineligible to vote. Yet here, as in many states, Texas equalized legislative districts on a population basis without regard to its effects on voting strength. This has resulted in a huge disparity of voting power among

its citizens, depending, in direct contravention of *Reynolds*, on where they live within the State.

Standing alone this case would present a "substantial question" worthy of setting the matter for oral argument. In light of the confused and varied treatment throughout the circuits, there is no room for argument that the question is not substantial.

Amicus further note below that, if the question requires a balancing or choice between the rights of non-citizens to representation and the Equal Protection rights of citizens under the one-person, one-vote doctrine, the current state of the law, particularly in the Ninth Circuit, wrongly subordinates the voting rights of citizens. *Reynolds* used population balancing as a means to achieve the "overriding objective" of substantially equally-weighted votes, not as an end in itself.

But legislatures need not always choose one interest over the other. This case shows that, particularly in light of technological advances in software databases, states can construct districts that are both substantially equal in population and voting strength. When, as here, a legislature's refusal to achieve both goals yields a districting scheme that weights some votes 50% more than others, the one-person, one-vote principle is violated. At a minimum, further briefing and argument would demonstrate the extent to which technology has eliminated the need to make an either/or choice between population equality and voting equality

ARGUMENT

I. The Question Presented Is Substantial, And Now Is The Right Time To Answer It.

At this stage, the Court need only decide that the question raised by the appeal is "substantial" to set the case for oral argument. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975). The Jurisdictional Statement raises a question that satisfies this standard: do voters still have an enforceable vote-dilution claim under the Fourteenth Amendment when their legislature dilutes the power of their vote by as much as 50% compared to other voters in nearby districts?

The only reason the answer to this question is not "Of course!" in the Ninth (and every) Circuit is that the district lines in this case were drawn on the basis of total population, without regard to relative concentrations of voters or potential voters. The Fourth and Fifth Circuits have defaulted to treating such claims as unreviewable until the Court resolves the issue. *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996) ("In the absence of a clear pronouncement from the Supreme Court on this issue, the district court's actions here should have been tempered by the overriding theme in the Court's prior apportionment cases weighing against judicial involvement."); *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000) (asserting that "propriety under the Equal Protection Clause of using total population rather than a measure of potential voters also presents a close question," and pending "more definitive guidance from the Supreme Court, we conclude that this eminently political question has been left to the

political process"). The district court applied *Chen*'s approach and allowed citizens in some Texas districts to continue exercising far greater voting power than their fellow citizens in other parts of the State. The Ninth Circuit says this form of vote dilution, *no matter how severe*, cannot give rise to an Equal Protection claim since district lines *must* be drawn on the basis of total population under the Fourteenth Amendment. *Garza v. County of Los Angeles*, 918 F. 2d 763 (9th Cir. 1990).

Here, as in *Garza* and *Chen*, the principal reason for the gross disparity in voting power between voters in Texas's senate districts is the presence of large numbers of people ineligible to vote who are counted for purposes of districts based on total population, but would not be counted in districts based on registered or potentially registered voters. *See Garza*, 918 F.2d at 773; *Chen*, 206 F.3d at 522. For at least two decades following *Reynolds*, the Court did not need to address this aspect of the reapportionment "thicket" because it could rightly assume that total population was an "effective proxy for voter population." Krabill & Fielding, *No More Weighting: One Person, One Vote Means One Person, One Vote*, 16 Tex. Rev. L. & Pol. 275, 282 (Spring 2012) (noting that, through the mid-1980s, "there were scant cases involving a one person, one vote challenge to a particular apportionment base.").

For many years following *Reynolds*, it remained a "happy coincidence" for redistricting purposes that eligible voters would "frequently track the total population evenly." *See Chen*, 206

F.3d at 525. That is no longer the case for several states. *Reynolds* recognized that the "complexions of societies and civilizations change, often with amazing rapidity," 377 U.S. at 567 And so it has in many states as a result of the increased presence of non-citizen residents ineligible to vote, particularly throughout the South and West. *See* Bryan Baker & Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012* at 3 (U.S. Dep't of Homeland Sec., Office of Immigration Statistics, March 2013) (charting increased growth of unauthorized immigrant population in late 1990s and early 2000s); Nancy Rytina, *Estimates of the Legal Permanent Resident Population in 2012* at 3 (U.S. Dep't of Homeland Sec., Office of Immigration Statistics, July 2013) (charting growth of legal permanent resident population during same period).[2]

This case demonstrates the relative ease with which relying solely on population equality across districts can cause gross disparities in voting

---

[2] Government population statistics reveal that total population figures include more than 13 million authorized immigrants (legal permanent residents) throughout the nation, with heavy concentrations in California, New York, Texas, and Florida. Rytina, *supra* at 4. The government further estimates the presence of 11.4 million unauthorized immigrants. Baker & Rytina, *supra* at 1. Research shows that unauthorized immigrants comprise at least 6% of the total population in five States (Nevada, California, Texas, New Jersey, and Arizona) and six more states have concentrations of 4.1% or more. Jeffrey S. Passel & D'Vera Cohn, Pew Hispanic Center, *Unauthorized Immigrant Population: National and State Trends, 2010*, 15 (Feb. 1, 2011) (six more States have concentrations of 4.1% or more).

strength across districts in states with substantial populations people ineligible to vote. Despite plain statements by this Court in multiple cases that *equality of voting strength* lies at the heart of the one-person, one-vote doctrine, "[w]hatever the means of accomplishment,"[3] the Texas Legislature took no steps to adjust senate districts to reduce the voting-power disparity. *See* Juris. St. App. 24a, 33a, and SA-2-3.[4] As a result, Texas voters have vastly different voting strength depending on whether they live in areas with heavy concentrations of non-citizen residents. This violates *Reynolds*' "basic principle" that "the weight of a citizen's vote cannot be made to depend on where he lives." *See Reynolds*, 377 U.S. at 567 ("The fact that an individual lives here or there is

---

[3] *See Reynolds*, 377 U.S. at 579 ("Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts *so that* the vote of any citizen is approximately equal in weight to that of any other citizen in the State.") (emphasis added); *Gaffney v. Cummings*, 412 U.S. 735, 744 (1973) (same); *Mahan v. Howell*, 410 U.S. 315, 322 (1973) (same); *Hadley v. Jr. College Dist. Of Metro. Kansas City, Missouri*, 397 U.S. 50, 54 (1970) (the "Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as is practicable, as any other person's.").

[4] This point bears emphasis. Whereas the issue is often cast as an either/or choice between population equality and equality of voting strength, *see, e.g.*, *Garza*, 918 F.2d at 775 (assuming that the alternative to strict population-based districts for city council was "refus[ing] to count" non-citizen residents and minors), the facts here demonstrate that both interests can be accommodated with relative ease. *See also infra*, sections II and III.

not a legitimate reason for overweighting or diluting the efficacy of his vote.").

This anomalous circumstance cries out for attention. The presence of substantial populations of non-citizen residents is a relatively recent development that has emerged over the past two decades and is not expected to change. In the meantime, *amicus* respectfully submits that voters impacted by this condition deserve the dignity guaranteed them under *Reynolds* and the Fourteenth Amendment. "To the extent that a citizen's right to vote is debased, he is that much less a citizen." 377 U.S. at 567. Now is the time to address this debasement of citizens' voting power.

The concentrations of non-citizen residents ineligible to vote are generally most pronounced in circuits (the Fifth and Ninth) that have already addressed the issue. That these Circuits have taken starkly differing approaches only emphasizes the substantial and timely nature of the question.

II. "Equal Representation" Interests Should Not Trump Electoral Equality In Disputes Over Non-Congressional Districts.

District-drawers, courts, and commentators often assume that they face an either/or choice in redistricting: Do they pick population equality or voter equality? *Garza* provides the model for the debate. In a case that similarly involved the substantial presence of non-citizen residents, the Ninth Circuit accepted as a given that "[b]asing districts on voters rather than total population results in serious population inequalities across

districts." 918 F.2d at 774. It further assumed, "basing districts on voting population rather than total population would disproportionately affect these rights for people living in the Hispanic district. Such a plan would dilute the access of voting age citizens in that district to their representative, and it would similarly abridge the right of aliens and minors to petition that representative." *Id.* at 775. Never mind that, as a result of this focus on population balancing alone, "a vote cast in District 1 count[ed] for almost twice as much as a vote cast in District 3." *Id.* at 780 (Kozinski, J., concurring in part and dissenting in part).

Judge Kozinski succinctly characterized the purportedly competing interests as the "principle of equal representation" versus the "principle of electoral equality." *Id.* at 781-785; *see also Chen*, 206 F.3d at 525 (discussing Judge Kozinksi's *Garza* opinion and noting that the "choice between these two models is stark"). *Amicus* agrees with Judge Kozinski's conclusion that "a careful reading of the Court's opinions suggests that equalizing total population is viewed not as an end in itself, but as a means of achieving electoral equality." 918 F.2d at 783 (Kozinski, concurring in part and dissenting in part); *see also id.* at 782 ("It is very difficult . . . to read the Supreme Court's pronouncements in this area without concluding that what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation."); *see also generally* Krabil & Fielding, *No More Weighting*, *supra* (discussing the competing models and arguing, at 277, that each of *Garza*, *Daly*, and *Chen* "improp-

erly cast the one person, one vote rule as protecting the right of nonvoters to equal representation instead of the right of voters to an equally weighted vote"). Again, and as Judge Kozinski stressed as well, *Reynolds* said the "overriding objective must be substantial equality of population among the districts, *so that* the vote of any citizen is approximately equal in weight to that of any other citizen." *Garza*, 918 F.2d at 783 (Kozinski, concurring in part and dissenting in part) (citing *Reynolds*, 377 U.S. at 579 (emphasis in *Garza*).

The *Garza* majority disagreed. It read *Reynolds* as requiring strict adherence to population-balance *even if* it resulted in vote dilution. It concluded that *Reynolds* "held that apportionment for state legislators must be made upon the basis of population." 918 F.2d at 774 (citing *Reynolds*, 377 U.S. at 568). The sentence from *Reynolds* cited here, however ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.") is followed by a second sentence that proves Judge Kozinski's "so that" point:

> Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

Reynolds, 377 U.S. at 568.

Garza also understood *Reynolds* to have applied the "standard enunciated" in *Wesberry v. Sanders*, 376 U.S. 1 (1964), "that 'the fundamental principle of representative government is one

of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state.'" *Garza*, 918 F.2d at 774. The surrounding language in *Reynolds*, however, undermines *Garza*'s holding and illuminates the larger issue here.

Before citing *Wesberry* as establishing the "fundamental principle of representative government" being equal representation, *Reynolds* stressed that *Wesberry* was "of course not dispositive of or directly controlling on our decision" involving state districts, because *Wesberry* involved *congressional districts*. Thus, *Wesberry* and *Gray v. Sanders*, 372 U.S. 368 (1963), "were based on different constitutional considerations and were addressed to rather distinct problems." *Reynolds*, 377 U.S. at 560. Namely:

> *Wesberry* was of course grounded on that language of the Constitution which prescribes that members of the Federal House of Representatives are to be chosen "by the People," [Article I, sec. 2] while attacks on state legislative apportionment schemes, such as that involved in the instant cases, are principally based on the Equal Protection Clause of the Fourteenth Amendment.

Reynolds, 377 U.S. at 560.[5]

---

[5] *Garza* repeats this fundamental mistake by citing *Kirkpatrick v. Priesler*, 394 U.S. 526, 531 (1969), another congressional redistricting case, for the proposition that "[t]he purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure 'equal representation for equal numbers of people.'" 918 F.2d at 775.

Then, after citing *Wesberry*'s "fundamental principle," the Court summarized the *different* question at issue in *Reynolds*: "Our problem, then, is to ascertain, in the instant cases, whether there are any constitutionally cognizable principles which would justify *departures from the basic standard of equality among voters* in the apportionment of seats in state legislatures." *Id.* at 561 (emphasis added).[6] The Court then recognized the "individual and personal" nature of the one-person, one-vote right and rejected the various justifications proffered to avoid equality of voting.

Amicus respectfully submits that *Reynolds* provides the answer to the supposed choice between the interests of representative equality and electoral equality: a single-minded focus on population-balancing, at the expense of voting equality, violates the Equal Protection Clause. It is anomalous, to put it mildly. to conclude that the watershed opinion establishing an Equal Protec-

---

[6] This passage also bears on the debate over the effect of *Burns v. Richardson*, 384 U.S. 73 (1966), which involved reliance on voting statistics where reliance on strict population figures would have led to extreme voting disparities in light of Hawaii's unusual demographics. Courts have reached very different conclusions about *Burns*. *Cf. Garza*, 918 F.2d at 774 (treating *Burns* as if it were in tension with *Reynolds*); *id.* at 784 (Kozinski, concurring in part and dissenting in part) ("*Burns* can only be explained as an application of the principal of electoral equality"); *Chen*, 206 F.3d at 526-27 (concluding that both sides in *Garza* were wrong when it came to *Burns*). In *Hadley*, it should be noted, the Court cited *Burns* for the proposition that "[t]his Court has consistently held in a long series of cases, that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's." 397 U.S. at 54 and n.7.

tion right against vote dilution actually *requires* an apportionment method that *results in vote dilution.*

While the *Chen* court rejected *Garza*'s choice of priorities, it elected to choose neither side and instead followed *Daly*'s approach of treating the whole matter as a political question, pending "more definitive guidance from the Supreme Court." *Chen*, 206 F.3d at 528; *Daly* 93 F.3d at 1227 By refusing to intervene in the defense of voting equality, the Fourth and Fifth Circuits allow states, as Texas did here, to choose population equality as the ultimate goal, thereby permitting the very result that *Reynolds* held the Equal Protection Clause forbids: substantial vote dilution. Setting aside that the traditional understanding of the political question doctrine does not turn on perceived ambiguity in the Court's prior cases but rather on a variety of other factors,[7] the fact of the deep divide over which of the supposedly competing interests *Reynolds* serves only underscores the need for the Court's clarification.

---

[7] The political question doctrine represents a "narrow exception" to the general rule that "the Judiciary has a responsibility to decide cases properly before it, even those it 'would gladly avoid.'" *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (citations omitted). Under this doctrine, a court lacks authority to resolve a dispute "where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Id.* (citations omitted).

III. Technology May Have Rendered The Supposed Choice Between Population Equality And Voting Equality A False One.

Fifty years ago "it may not [have been] possible to draw congressional districts with mathematical precision," *Wesberry*, 376 U.S. at 18, but it is now. Advances in population database software (and its widespread use in the redistricting process) further underscore the propriety of granting plenary review. These advances show that most (if not all) cases no longer require an either/or choice between population equality and electoral equality. The complaint in this case alleged that "Texas could have safeguarded both the constitutional one-person, one-vote electoral principle and its interest in equally populated Senate districts." App 24a.

Within twenty years of *Wesberry*'s observation about the limits on fine-tuning district lines, the Court observed that computer-driven redistricting had altered the field:

> If anything, this standard [of population equality for congressional districts] should cause less difficulty now for state legislatures than it did when we adopted it in *Wesberry*. The rapid advances in computer technology and education during the last two decades make it relatively simple to draw contiguous districts of equal popula-

> tion and at the same time to further whatever secondary goals the State has.

Karcher v. Daggett, 462 U.S. 725, 733 (1983); *see also id.* at 752 (Stevens, J., concurring) ("developments in computer technology have made the task of the gerrymanderer even easier."). As Justice Powell put it a few years later, "[c]omputer technology now enables gerrymanderers to achieve their purpose while adhering perfectly to the requirement that districts be of equal population." *Davis v. Bandemer*, 478 U.S. 109, 174 (1986) (Powell, J., concurring in part and dissenting in part).

The technology has become even more sophisticated in the period since *Karcher* and *Davis*. Most recently, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), several Justices acknowledged that technological advances now enable a level of precision in district-drawing unimagined when *Baker*, *Reynolds*, and *Wesberry* were decided—and allow the task to be accomplished with relative ease and efficiency. *See id.* at 312-13 (Kennedy, J., concurring) ("Computer assisted districting has become so routine and sophisticated that legislatures, experts, and courts can use databases to map electoral districts in a matter of hours, not months."); *id.* at 353-54 (Souter, J., dissenting) (citing, inter alia, Pamela S. Karlan, *The Fire Next Time: Reapportionment After the 2000 Census*, 50 Stan. L.Rev. 731, 736 (1998) ("Finer-grained census data, better predictive methods, and more powerful computers allow for increasingly sophisticated equipopulous gerrymanders")); *id.* at 364 (Breyer, J., dissenting) (noting that "enhanced computer technology allows the parties

to redraw boundaries in ways that target individual neighborhoods and homes, carving out safe but slim victory margins in the maximum number of districts").

By 2000, all states used redistricting software that allowed "redistricting authorities to draw districts at the block level using point-and-click technology and evaluate basic measures of redistricting plans like population balance, party registration balance, and a few measures of compactness." Micah Altman & Michael McDonald, *The Promise & Perils of Computers in Redistricting*, Duke J. Const. L. & Pub. Pol'y 79 (2010); *see also id.* at 72-79 (surveying advances in redistricting technology). One commentator (quoted by Justice Souter in *Vieth*) has explained that "technological advance in data collection and computer technology" "have enhanced the capacity to gerrymander effectively. Recent cases now document in microscopic detail the astonishing precision with which redistricters can carve up individual precincts and distribute them between districts with confidence concerning the racial and partisan consequences." Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 Yale L.J. 2505, 2553-2554 (1997). *See also* Micah Altman, et al., *Pushbutton Gerrymanders? How Computing Has Changed Redistricting* in *Party Lines: Competition, Partisanship, and Congressional Redistricting* 51-67 (Thomas E. Mann & Bruce E. Cain eds. 2005) (surveying history of computer use in redistricting).

Given these advancements and the sophisticated resources at states' disposal, there appears to no longer be a technological barrier to crafting

districts that achieve *both* population equality *and* voting equality. At a minimum, plenary review is warranted to allow for further briefing on this issue.

CONCLUSION

For these reasons, and those stated by appellants, the Court should note probable jurisdiction and set the case for oral argument.

Respectfully submitted,

BRADLEY A. BENBROOK
STEPHEN M. DUVERNAY
Benbrook Law Group, PC
400 Capitol Mall, Ste. 1610
Sacramento, CA 95814
(916) 447-4900
brad@benbrooklawgroup.com

SHANNON LEE GOESSLING
Counsel of Record
Southeastern Legal Foundation
2255 Sewell Mill Road, Ste. 320
Marietta, GA 30062
(770) 977-2131
shannon@southeasternlegal.org

Counsel for Amicus Curiae

March 2015

No. 14-940

Supreme Court, U.S.
FILED
MAR 6 - 2015
OFFICE OF THE CLERK

In the Supreme Court of the United States

SUE EVENWEL, EDWARD PFENNINGER

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIALCAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellee.

On Appeal from the United States District Court for the Western District of Texas

BRIEF AMICUS CURIAE OF TENNESSEE STATE LEGISLATORS AND THE JUDICIAL EDUCATION PROJECT IN SUPPORT OF APPELLANTS

Linda Carver Whitlow Knight
Gullett Sanford Robinson
& Martin PLLC
Suite 1700
150 Third Avenue, South,
Nashville, TN 37201
615-244-4994
lknight@gsrm.com

(additional counsel for Amici Curia are listed inside the front cover)

John J. Park, Jr.
Counsel of Record for Amicus Curiae
Strickland Brockington Lewis LLP
1170 Peachtree Street NE,
Suite 2200
Atlanta, GA 30309
678.347.2208
jjp@sbllaw.net

Carrie Severino
Judicial Education Project
722 12th St. NW, Fourth Floor
Washington, DC 20005
(571) 357-3134

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. This appeal presents a substantial question worthy of this Court's review. 5

A. This Court has long recognized that the question presented remains unsettled. 5

B. This appeal presents this Court with an opportunity to explain what the one-person, one-vote principle means in a factually compelling setting. 8

C. This Court's experience prior to *Baker v. Carr* demonstrates the danger in summarily affirming the district court's decision in this case. 10

II. Reliance on total population to the exclusion of measures of actual potential voters will over-weight urban districts and voters while under-weighting rural districts and voters. 13

A. The history of the application of one-person, one-vote standards to redistricting plans shows that it inexorably pulls districts toward areas with greater population. 14

B. The unlimited use of total population for reapportionment purposes without consideration of other measures threatens rural interests. 19

C. The problem of vote dilution is a problem that extends beyond Texas. 22

Conclusion 25

TABLE OF AUTHORITIES

Cases

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 8

Baker v. Carr, 369 U.S. 186 (1962) ..... *passim*

Baker v. Carr, 247 F. Supp. 629 (M.D. Tenn. 1965) 24

Baker v. Carr, 179 F. Supp. 824 (M.D. Tenn. 1959) 11

Brown v. Thomson, 462 U.S. 835 (1983) 9

Chen v. City of Houston, 121 S. Ct. 2020 (2002) 5

Chen v. City of Houston, 206 F. 3d 502 (5th Cir. 2000) 12

Colegrove v. Green, 328 U.S. 549 (1946) 6,11

Garza v. County of Los Angeles, 918 F. 2d 763 (9th Cir. 1991) 8,21

Kidd v. McCanless, 200 Tenn. 273, 292 S.W. 2d 40 (Tenn. 1956) 11,22

Reynolds v. Sims, 377 U.S. 533 (1964) ..... *passim*

White v. Regester, 412 U.S. 755 (1973) 9

Constitutional Provisions

TENN. CONST. Art. II, §§ 5 and 6 22

Rules

37.2(a) 1

37.6 1

Other Authorities

Pet. For Cert., *Lepak v. City of Irving*, No. 12-777, in the Supreme Court of the United States 20

Publications

J. Harvie Wilkinson, III, HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS, 1945-1966 (Univ. Press of Va. 1968). 18

Matthew D. McCubbins, *Congress, the Courts, and Public Policy: Consequences of the One Man, One Vote Rule*, 32 AM. J. OF POL. SCI. 388 (1988). 24

IDENTITY AND INTEREST OF AMICI CURIAE

This amicus brief is submitted by rural legislators from the States of Tennessee and by the Judicial Education Project in support of the arguments of the Evenwel Appellants.[1] Amici write separately to encourage this Court to review the question presented and to point out how using total population alone for reapportionment purposes without the consideration of alternate counting methods can unfairly, unreasonably, and unconstitutionally dilute rural votes.

Amici Tennessee Senators each represent rural districts as follows:

Lieutenant Governor Ronald Ramsey represents the 4th District covering Johnson County, which contains the town of Johnson City; Sullivan County, which contains the towns of Bristol and

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Communications reflecting such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae or its counsel made a monetary contribution to the brief's preparation or submission.

Kingsport; and part of the lightly-populated county of Carter.

Senator Mae Beavers represents the 17th District, which covers the lightly-populated counties of Cannon, Clay, DeKalb, Macon, and Smith and Wilson County, which contains the town of Lebanon.

Senator Mark Green represents the 22nd District, which covers the lightly-populated counties of Houston and Stewart and Montgomery County, which contains the small city of Clarksville.

Senator Delores Gresham represents the 26th District, which covers the lightly-populated counties of Chester, Decatur, Fayette, Hardeman, Hardin, Haywood, Henderson, and McNairy.

Senator Ferrell Haile represents the 18th District, which covers the county of Trousdale; Sumner County, containing the towns of Gallatin and Henderson; and a more-lightly populated, suburban area of Davidson County (Metropolitan Nashville).

Senator Jim Tracy represents the 14th District, which covers the lightly-populated counties of Bedford, Lincoln, Marshall, and Moore and a suburban portion of Rutherford County, which contains the small city of Murfreesboro.

The Judicial Education Project (JEP) is a national, non-profit educational institution dedicated

to strengthening liberty and justice through defending the Constitution as envisioned by the Framers—a federal government of defined and limited powers, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation. JEP's educational efforts are conducted through various outlets, including print, broadcast, and internet media. JEP has filed amicus briefs in numerous cases in this Court and in the federal courts of appeals, including this Court's 2013 case *Shelby County v. Holder*.

SUMMARY OF ARGUMENT

Since this Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), it has been clear that States and localities have a constitutional obligation to redraw their legislative and administrative districts in compliance with the principle of one-person, one-vote. As this Court explained, "The overriding objective must be substantial equality of population among the various districts, so that the vote of one citizen is approximately equal in weight to that of any other citizen in the State. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). *See also id.* at 577 (States and localities must "make an honest and good faith effort to construct districts ... as nearly of equal population

as is practicable," although "[m]athematical exactness or precision" is not required).

This appeal shows that the use of total population as the basis for apportionment can conceal significant differences in the actual voting strength of districts and thereby violate the mandate of *Baker*. Actual voting strength can be measured by considering total voter registration, non-suspense voter registration, or citizen voting-age population. When the use of total population produces an overall population deviation that is greater than that allowed by this Court or by the jurisdiction[2], unconstitutional vote dilution results.

This Court should note probable jurisdiction and address whether Texas's use of total population for apportionment purposes fails one-person, one-vote standards because the resulting plan denies some voters—in this case, rural voters— an equal vote. This Court must rectify the unconstitutional reapportionment of the Texas Senate, reverse the district court's erroneous ruling, and reaffirm the mandate of *Baker* and *Reynolds*.

---

[2] In the most recent round of redistricting following the release of the 2010 Census results, Alabama, California, Florida, Georgia, Illinois, Indiana, Iowa, Minnesota, Nevada, Oklahoma, Utah, Virginia, Washington, and Wisconsin used an overall deviation of 2% or less to redistrict one or both houses of their respective legislatures. See *Alabama Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227, 1246 (M. D. Ala. 2013) (three-judge court), appeal pending, Nos. 13-895, 13-1138, in the United States Supreme Court.

ARGUMENT

This appeal is worthy of review for two reasons. First, it presents a substantial, unsettled question of constitutional construction that will only become more pressing if this Court does not act. Second, the unfair and imbalanced use of total population figures has upset the balance between urban and rural interests in many states to the detriment of rural voters. This is not the first case in which this issue has been before the Court, and rural voters will have no recourse if this Court does not rectify this recurring pattern.

I. This appeal presents a substantial question worthy of this Court's review.

This appeal presents a question which this Court has noted but has not settled: whether apportionment must be based on eligible voter population or whether apportionment based solely on total population is sufficient to satisfy one-person, one-vote standards.

It also offers this Court an opportunity to clarify the one-person, one-vote principle. As Justice Thomas has observed, if the Court is to require that jurisdictions to comply with one-person, one-vote, it "ha[s] an obligation to explain to States and localities what it actually means." *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2002) (Thomas, J., dissenting from the denial of certiorari). Allowing

jurisdictions to choose their measure of population for apportionment purposes creates a significant loophole allowing districts to be created with wide variations in voting strength.

In addition, leaving the choice of a counting method to the State or locality on the ground that it presents a political issue is redolent of the superseded approach of *Colegrove v. Green*, 328 U.S. 549 (1946), and ignores the existing law laid down in *Baker* and *Reynolds* which held that courts have a role to play in ensuring equal representation across districts.

A. This Court has long recognized that the question presented remains unsettled.

In *Burns v. Richardson*, 384 U.S. 73 (1966), this Court observed, "We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured." *Id.* at 91. It upheld Hawaii's use of registered voter data for an interim apportionment applicable to only one election for the State Senate, explaining that it found "no demonstrated error in the District Court's conclusion that the apportionment achieved by use of a registered voter basis substantially approximated that which would

have appeared had state citizen population have been the guide." *Id.* at 96.

The Court pointed out, "We are not to be understood as deciding that the validity of the registered voter basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere." *Id.* In the nearly 40 years since *Burns v. Richardson*, this Court has still not identified whether the use of total population as the sole basis for reapportionment is constitutional when it results in a substantial deviation. In 1969, the Court "assum[ed] without deciding that apportionment may be based on eligible voter population rather than total population...." *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 (1969). Similarly, the Court declined to decide whether "school enumeration figures" might be used instead of "actual population figures" in *Hadley v. Junior Coll. Dist. of Metro Kansas City, Mo.*, 397 U.S. 50, 57 n. 9 (1970).

In his dissent from the denial of certiorari in *Chen*, Justice Thomas noted that allowing jurisdictions to choose how to count their populations could make the one-person, one-vote principle "of little consequence." 121 S. Ct. at 2021 (Thomas, J., dissenting from denial of certiorari). Earlier, Judge Kozinski had also pointed to the competition between using total population as the basis for apportionment on the one hand and equalizing voting power on the other. He recognized that

"[a]pportionment by population can result in unequally weighted votes...." *Garza v. County of Los Angeles*, 918 F. 2d 763, 781 (9th Cir. 1991) (Kozinski, concurring in part and dissenting in part). In Judge Kozinski's view, "It is very difficult ..., to read the Supreme Court's pronouncements ... without concluding that what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation." *Id.* at 782. Thus, at least on Justice and a prominent Court of Appeals judge have concluded not only that the question presented is substantial, but also that the Evenwel Appellants' position is meritorious.

B. This appeal presents this Court with an opportunity to explain what the one-person, one-vote principle means in a factually compelling setting.

This appeal provides an appropriate vehicle for resolving the important questions left open by this Court. In their Complaint, the Evenwel Appellants allege that "[m]any" of the Texas Senate districts are "severely over- or under-populated with electors relative to other districts in the State." J.A. at 26a, ¶ 27.[3] When the population of the districts is measured by citizen voting-age population, total voter registration, and non-suspense voter

---

[3] Because this case was addressed and resolved on a motion to dismiss, the nonconclusory allegations of the Evenwel Appellants' complaint should be taken as true. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009).

registration instead of total population the overall population deviation ranges from 46.77% to 55.06%. J.A. at 27a. Evenwel's and Pfenninger's Senate districts likewise have overall population deviations from the ideal population that exceed 30.81% for each of the alternate measures. J.A. at 28a, 30a. The Evenwel Appellants allege, "The effect of this severe overpopulation of electors is that the Plaintiffs' votes carry far less weight than the votes of other citizens in districts that are under-populated with electors." J.A. at 31a, ¶ 31.

This Court has observed that, for state and local redistricting plans, "an apportionment plan with a maximum population deviation under 10% does not violate the Fourteenth Amendment." *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *see also White v. Regester*, 412 U.S. 755 (1973); *but cf. Larios v. Cox*, 300 F. Supp. 2d 1320 (N. D. Ga.), *aff'd*, 542 U.S. 947 (2004) (Georgia legislative plans with an overall deviation of less than 10% violate one-person, one-vote standards). In contrast, a plan with an overall deviation of more than 10% "creates a prima facie case of discrimination and therefore must be justified by the State." *Id.* at 843.[4]

---

[4] This Court found that a Wyoming legislative plan with overall deviations larger than 10% could be justified by the "peculiar size and population" of Wyoming, the absence of any bias in favor of rural or urban interests, and the *de minimis* effect on voters. *Brown v. Thomson*, 462 U.S. at 843-47. Even so, its approval of a plan with an average deviation from population

The deviations in voting strength in the Texas Senate plan far exceed those deemed constitutional. In *Larios v. Cox*, the district court found that Georgia's legislative plans "plainly violate the one person one vote principle embodied in the Equal Protection Clause" even though the overall deviation of 9.98% was less than 10%. 300 F. Supp. 2d at 1322. The court explained that plans "arbitrarily and discriminatorily dilute[d] and debase[d] the weights of certain citizens' votes by intentionally and systematically underpopulating rural districts in rural south Georgia and inner city Atlanta, correspondingly overpopulating the districts in suburban areas surrounding Atlanta, and by underpopulating the districts held by incumbent Democrats." *Id.* In the same way here, Texas has inexplicably diluted the votes of rural voters by drawing Senate districts based solely on total population when other methods of constitutionally apportioning districts were readily available.

C. This Court's experience prior to *Baker v. Carr* demonstrates the danger in summarily affirming the district court's decision in this case.

Treating the choice of a counting method as a political question facilitates an end run around one-person, one-vote requirements. Just such an end run

---

equality of 16% and an overall deviation of 89% must be regarded as an outlier.

took place in the lead up to *Baker v. Carr*. After this Court held that Illinois' failure to redraw its congressional districts for 40 years presented a political question in *Colegrove v. Green*, it took the Court 16 years to correct that problematic precedent. In *Baker v. Carr*, this Court finally reversed a district court's reliance on the political question doctrine and held that Tennessee's failure to reapportion its legislature since 1901 was unconstitutional.[5] That failure had resulted in a legislature in which political power was grossly skewed in favor of rural districts.

Two years later, this Court again rejected a district court's reliance on *Colegrove* in dismissing a malapportionment-based challenge to Georgia's congressional plan. *Wesberry v. Sanders*, 376 U.S. 1 (1964). It built on *Baker* to hold that, for congressional redistricting purposes, "as nearly as is practicable one man's vote in a congressional

---

[5] This Court reversed the district court's dismissal of the case in reliance on *Colegrove* and its progeny. *Baker v. Carr*, 179 F. Supp. 824 (M.D. Tenn. 1959) (three-judge court). In addition, it retreated from its action dismissing the appeal in *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W. 2d 40 (Tenn.), *appeal dismissed*, 352 U.S. 920 (1956). In *Kidd*, the Tennessee Supreme Court all but threw up its hands in holding that the Tennessee legislative reapportionment plan approved in 1901 could not be set aside in the 1950s because there was nothing to replace it.

election is to be worth as much as another's." *Id.* at 7-8 (footnote omitted); *see also Reynolds v. Sims.*

In this case, the district court held that the Evenwel Appellants failed to state a claim as to which relief could be granted because the use of total population as the sole metric was not unconstitutional and the resulting overall population deviation was less than 10%. J.A. at 8a. In so doing, the district court followed the Fourth and Fifth Circuits, which, like the pre-*Baker* courts, left this serious constitutional question to the political process. *See Daly v. Hunt*, 93 F. 3d 1212, 1227 (4th Cir. 1996); *Chen v. City of Houston*, 206 F. 3d 502, 523 (5th Cir. 2000), *cert. denied*, 542 U.S. 1046 (2001). By relegating this issue to the political process, the district court overlooked the way in which facial compliance with one-person, one-vote standards masks substantial vote dilution. Absent intervention from this Court, such vote dilution will recur because the problem is not limited to Texas, as discussed below.

Amici respectfully contend that this Court should not allow the issue to fester any longer. This case is an appropriate vehicle for considering it and for reaffirming *Baker* and *Reynolds.*

II. Reliance on total population to the exclusion of measures of actual or potential voters will overweight urban districts and voters while underweighting rural districts and voters.

This Court's early one-person, one-vote cases were the product of apportionment schemes that systematically gave disproportionate political power to rural interests. This appeal shows that the shoe is now on the other foot; the use of total population alone in redistricting over-weights the votes from urban areas to the detriment of those from rural areas. Moreover, while the Evenwel Appellants have shown that the problem is readily apparent in Texas, it is not a Texas-only issue.

As this Court has held, the votes of urban and rural voters should be equally weighted. *See, e.g.*, *Reynolds*, 377 U.S. at 562-63 ("Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there."); *Wesberry*, 376 U.S. at 8 ("It would be extraordinary to suggest that ... the votes of inhabitants in some parts of a State ... could be weighted at two or three times the votes of people living in more populous parts of the State ...."). To the extent that one-person, one-vote compliance has moved districts toward urban and suburban areas in response to actual shifts in voting population density, Amici do not object. This appeal is not, however, one of those fair applications of this

principle. Rather, by including non-voters and inhabitants who are not eligible to vote, who are heavily concentrated in urban districts, in the total population for reapportionment purposes, the Texas Senate plan unfairly inflates the figures for urban districts to the detriment of rural districts and voters. Reapportioning done in this manner is as unconstitutional as not reapportioning at all, a violation that this Court remedied in *Baker*.

A. The history of the application of one-person, one-vote standards to redistricting plans shows that it inexorably pulls districts toward areas with greater population.

In the early redistricting cases, like *Baker v. Carr* and *Reynolds v. Sims*, the complaints came from parts of the State that were underrepresented. In *Baker*, the plaintiffs were residents of Davidson (Nashville), Hamilton (Chattanooga), Knox (Knoxville), Montgomery (Clarksville), and Shelby (Memphis) Counties. 369 U.S. at 204.[6] In *Reynolds*, the original plaintiffs came from Jefferson County (Birmingham), which was and is the most populated

---

[6] In 1950, Davidson, Hamilton, Knox, and Shelby counties were the most populated in the State, and Montgomery County had more population than many others. *See* http://archive.knoxmpc.org/locldata/popdata/tn_counties_hist_pop.pdf.

in the State. 377 U.S. at 537. Additional plaintiffs came from Mobile and Etowah (Gadsden) Counties. *Id.* at 541.[7] The *Baker* and *Reynolds* plaintiffs asserted that the overpopulation of their urban districts and the underpopulation of rural ones unconstitutionally diluted their votes.

In *Reynolds*, this Court held that the overriding objective must be substantial equality of population among the various districts, so that the vote of one citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds*, 377 U.S. at 579; *see also Board of Estimate v. Morris*, 489 U. S. 688, 701 (1989) (quoting *Reynolds*). It rejected Alabama's reliance on both the 1901 constitutional plan and alternate plans that were drawn using counties as building blocks. Some counties, typically the urban ones, were far more populated than other rural ones, and the resulting population deviations were enormous.

For example, in the 1901 Alabama House plan, which was still in effect, changes between 1901 and 1960 meant that Bullock County, with a population of 13,462, and Henry County, with a population of 15,286, got two seats each, while Jefferson County, with 634,864 people, got seven

---

[7] In 1960, Jefferson and Mobile were the most populated counties, and Etowah was the sixth most populated. *See* https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=1960%20population%20in%20alabama%20by%20county.

seats. *Id.*, at 545-46.[8] Under that arrangement, 27.5% of the residents could elect a majority of the House.

Alabama's continued reliance on counties as building blocks meant that the alternate House and Senate plans also failed one-person, one-vote scrutiny. Under a proposed alternative House plan that would be adopted by constitutional amendment, some 43% of the State's population could elect a majority of the House, and the population-variance ratio would be 4.7:1. *Id.* at 549. The proposed statutory House plan was not quite so balanced. Under it, "about 37% of the State's total population would reside in counties electing a majority of the members of the Alabama House of Representatives, with a maximum population-variance ratio of about 5-to-1." *Id.* at 549-50.

The Senate plans had correspondingly large population disparities. By 1960, 25.1% of the State's total population could elect a Senate majority using the 1901 Senate districts. *Id.* at 545. The proposed constitutional amendment, which contemplated giving one senator to each of the 67 counties, would

---

[8] Bullock County is southeast of Montgomery and Montgomery County, while Henry County is the second county north of Florida along the line between Alabama and Georgia. In the 2010 Census, Bullock County had only 10,915 residents, and Henry County had just 17, 302. In contrast, Jefferson County had 658,456 residents.
See www.ador.state.al.us/licenses/census.html.

have given the smallest 34 counties a majority of the Senate seats even though the total population of those counties was less than that of Jefferson County. *Id.* at 547.

As this Court said, "[I]t is inconceivable that a state law to the effect that, in counting votes for legislators, *the votes* of citizens in one part of the State would be multiplied by two, five, or 10, while *the votes* of persons in another area would be counted only at face value, could be constitutionally sustainable." *Id.* at 561 (emphasis added). Such an "inconceivable" counting could not be avoided so long as counties remained the building blocks for Alabama's legislative plans. The rural counties were too numerous for the urban counties to counterbalance.

The application of one-person, one-vote standards to an expanded, non-discriminatory electorate in Alabama has resulted in greater representation for urban and suburban areas. In the most recent round of redistricting, the areas that grew the most were Madison County outside Huntsville, Shelby County just south of Birmingham, and Baldwin County, across Mobile Bay from Mobile. The 2012 legislative redistricting plans necessarily spread that overpopulation into neighboring districts.

In much the same way, the application of one-person, one-vote principles to an expanded electorate brought about the end of the Byrd Machine in Virginia. In HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS, 1945-1966 (Univ. Press of Va. 1968), the Honorable J. Harvie Wilkinson III ("Judge Wilkinson") traced the way in which the Machine, originally based in the Shenandoah Valley and Southside Virginia, gradually gave way to the political power of the urban and suburban corridor from the Northern Virginia suburbs of Washington, D.C., through Richmond to the Tidewater.

The swing in political power began with population growth "within th[e] urban corridor," which also had little in common with the rural and agricultural parts of the State favored by the Machine. *Id.* at 195, 170-76. While the urban areas grew, the central Southside Virginia counties that were part of "the Byrd organization's traditional strongholds" lost population. *Id.* at 161-62.

The change in the locus of power became apparent after Virginia's 1962 redistricting was set aside as the result of a lawsuit filed by urban interests. *Id.* at 248-49. The new redistricting coincided with a dramatic expansion of the electorate. *Id.* at 258-59. The political consequences of these changes were quickly apparent. Lyndon Johnson in 1964, Governor Mills Godwin in 1965, and Senator William Spong in 1966 each prevailed

with the help of the new and urban voters over opposition from the rural white voters who were the strong supporters of the Byrd machine. *Id.* at 346.

Today, 50 years after *Baker v. Carr* and *Reynolds v. Sims*, compliance with one-person, one-vote standards generally entails increasing the geographical coverage of rural districts to compensate for growth in urban and suburban areas.

B. The use of total population for reapportionment purposes without consideration of other measures threatens rural interests.

The examples of Tennessee, Alabama and Virginia show that the natural trajectory of one-person, one-vote pulls legislative districts toward more populated, typically urban and suburban parts of the State. This appeal shows how that process can unfairly and unconstitutionally burden rural interests by impermissibly counting ineligible residents in urban and suburban districts who are included in the total population count. While one would reasonably presume that there would be more people who are not eligible to vote in urban areas than in rural areas simply because there are more people in urban areas, there is evidence to support this presumption.

First, this appeal shows that the underpopulated districts are urban and the overpopulated districts are rural. Appellant Evenwel lives in Titus County in rural northeast Texas, and Appellant Pfenninger lives in Montgomery County north of Houston. *See* J. S. App. D, at 19a-20a, ¶¶ 6, 7. They allege that their districts are underpopulated in terms of citizen voting-age population, total voter registration, and non-suspense voter registration. *Id.* at 27a-30a. In contrast, the districts that are underpopulated with voters are largely urban or suburban, and three of the five most underpopulated are in Houston.

Moreover, previous cases show how voters are not equally distributed geographically. In *Lepak v. City of Irving*, for example, the petition for certiorari showed that the difference between total population and voting age population in the city council districts was not uniform. *See* Pet. For Cert. at 9, *Lepak v. City of Irving*, No. 12-777, in the Supreme Court of the United States. Instead, while the total population for District 1, was 31,642, its voting-age population was 20,930, and its citizen voting-age population was only 11,231. *Id.* In contrast, the most populated District, District 5, had a total population of 33,126, a voting-age population of 26,000, and a citizen voting age population of 19,673. *Id.* As a result, District 5 had a total population that was greater than that of District 1 by 1,484, but its voting-age population was 5,070 greater, and its

citizen voting-age population was 8,442 larger. Ostensible compliance with one-person, one-vote standards thus concealed striking differences in the actual voting strength of the city council districts.

Likewise, in *Garza v. County of Los Angeles*, which involved the county commission for the County of Los Angeles, a low overall deviation of 0.68 nonetheless did not yield balanced districts. *See* 918 F. 2d at 773. As Judge Kozinski noted, "[T]he supervisor from District 1 can be elected on the basis of 353,826 votes ..., while the supervisor from District 3 requires at least 549,332 votes. Put another way, a vote cast in District 1 counts for almost twice as much as a vote cast in District 3." *Id.* at 780 (Kozinski, concurring in part and dissenting in part). He observed that, if qualified electors and not total population were used for the apportionment, the deviation between District 1 and District 3 in the Los Angeles County commission plan, which was 40%, would not satisfy one-person, one-vote standards.

While the instant appeal illustrates the rural/urban divide, *Lepak* and *Garza* show the same kind of inequality in the voting strength of districts at the local level. Whether statewide or local, however, the reliance on total population alone for reapportionment, with no consideration of voter population, will dilute the votes of many voters in

elections for offices ranging from city councils to the state legislature.

C. The problem of vote dilution is a problem that extends beyond Texas.

The Tennessee Amici are concerned about ensuring proper, constitutional reapportionment. After all, the *Baker* case itself arose in Tennessee. As discussed above, by the 1950s, the Tennessee General Assembly had not reapportioned its districts since doing so after the 1900 census, leaving Representatives and Senators from rural districts with undue power in the wake of the massive migrations to more urban districts during those 50 years. The rural legislators were determined to hold on to that power, and refused pleas from urban legislators to reapportion. Appeals to the Tennessee Constitution, which requires decennial reapportionment and provides that the houses shall be apportioned based on qualified voters[9], their claims fell upon deaf ears. A lawsuit was filed in state court, but the Tennessee Supreme Court's refused to grant relief in *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W. 2d 40 (Tenn. 1956). The plaintiffs turned to the federal courts, initiating *Baker v. Carr*. It took this Court's intervention to rectify the impasse and equalize the voting power of

[9] TENN. CONST. Art. II, §§ 5 and 6.

Tennessee's urban citizens. The thrust of *Baker* and its progeny is that all votes must count equally, or as equally as possible within a narrow range of permissible deviation.

Tennessee has taken the mandate of *Baker* and the principle of one person, one vote to heart. The General Assembly and the state courts have been conscientious about applying these rules. *See, e.g., State v. Crowell*, 631 S.W.2d 702 (Tenn. 1982). Tennessee amici believe that legislatures should be apportioned in a way that complies with this Court's precedents. If the district court's ruling in this case, and others like it, are allowed to stand, Tennessee's rural voters are likely to be as underrepresented as the State's urban voters were before *Baker*.

Several variables can lead to the geographically uneven distribution of voters. To the extent that total population and voting population can be attributed to the presence of minors who cannot vote, transient populations, and similar groups ineligible to vote, rural areas are more likely to have fewer of these. Rather, rural areas are likely to have older and more static populations and also to have higher rates of voter registration among citizens of voting age.

The over-weighting of urban voting strength to the detriment of rural voters translates into actual—not just theoretical—political and policy

effects. Urban interests will gain ground while rural ones suffer comparatively. *Cf.* Matthew D. McCubbins, *Congress, the Courts, and Public Policy: Consequences of the One Man, One Vote Rule*, 32 Am. J. of Pol. Sci. 388 (1988) (identifying "one of the biggest policy stories of the past two decades" as "the continuing reallocation of federal policy benefits from rural to nonrural Americans" and finding it attributable "in part" to court-ordered congressional redistricting). As the Republican leader of the Virginia House of Representatives crowed after Virginia redrew its legislative districts in 1964, "Every close urban-rural conflict which in the past has resulted in a rural victory will now be an urban victory." HARRY BYRD AND THE CHANGING FACE OF VIRGINIA POLITICS, at 249.

This is illustrated by the fact that the failure of States like Illinois, Tennessee, Georgia, and Alabama to redraw their congressional or legislative districts for decades redounded to the political benefit of those who favored the status quo—in those cases, rural legislators.

These States and others learned their lesson, thanks to this Court's intervention. As one federal district court in Tennessee noted, the courts felt the impact of *Baker v. Carr*: "Since that decision, there have been literally hundreds of published opinions dealing with apportionment." *Baker v. Carr*, 247 F.

Supp. 629, 631 (M.D. Tenn. 1965) (three-judge court).

In the same way, reapportionment based solely on total population rather than a voter-based metric favors the political interests of those who live in the districts with more voting strength. This Court should break the logjam just like as did in *Baker v. Carr.*

CONCLUSION

For the reasons stated, this Court should note probable jurisdiction and set this case for oral argument.

Respectfully submitted,

John J. Park, Jr.
Counsel of Record for Amicus Curiae
Strickland Brockington Lewis LLP
1170 Peachtree Street NE, Suite 2200
Atlanta, GA 30309
678.347.2208
jjp@sbllaw.net

Linda Carver Whitlow Knight
Gullett, Sanford, Robinson & Martin PLLC
Suite 1700
150 Third Avenue South
Nashville, TN 37201
615-244-4994
lknight@gsrm.com

Carrie Severino
Judicial Education Project
722 12th St. NW, Fourth Floor
Washington, DC 20005
(571) 357-3134

Supreme Court, U.S.
FILED
JUL 31 2015
OFFICE OF THE CLERK

No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR APPELLANTS

MEREDITH B. PARENTI
PARENTI LAW PLLC
7500 San Felipe, Suite 600
Houston, Texas 77063

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, Virginia 22201
(703) 243-9423
will@consovoymccarthy.com

Counsel for Appellants

July 31, 2015

259852

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that the Equal Protection Clause of the Fourteenth Amendment includes a "one-person, one-vote" principle. This principle requires that, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970). In 2013, the Texas Legislature enacted a State Senate map creating districts that, while roughly equal in terms of total population, grossly malapportioned voters. Appellants, who live in Senate districts significantly overpopulated with voters, brought a one-person, one-vote challenge, which the three-judge district court below dismissed for failure to state a claim. The district court held that Appellants' constitutional challenge is a judicially unreviewable political question.

The question presented is whether the "one-person, one-vote" principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

PARTIES TO THE PROCEEDING

Appellants are Sue Evenwel and Edward Pfenninger.

Appellees are Greg Abbott, in his official capacity as Governor of Texas, and Carlos Cascos, in his official capacity as Texas Secretary of State.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

BRIEF FOR APPELLANTS 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISION INVOLVED 1

INTRODUCTION 2

STATEMENT 3

I. The Texas Senate Redistricting 3

II. Appellants' Districts 10

III. Proceedings Below 13

SUMMARY OF ARGUMENT 14

ARGUMENT 19

Table of Contents

Page

I. Plan S172 Violates The One-Person, One-Vote Rule Of The Equal Protection Clause 19

II. No Theory The Lower Courts Have Relied On To Deny Eligible Voters An Equally Weighted Vote Is Sustainable 29

A. The district court's conclusion that Texas's choice of a population basis is immune from judicial review conflicts with *Baker v. Carr* and *Reynolds v. Sims* 29

B. The Ninth Circuit's representational equality rationale cannot be reconciled with *Burns v. Richardson* or any other decision 37

C. The Court has consistently rejected the "so-called federal analogy" 42

III. Plan S172 Is *Per Se* Unconstitutional Under The Settled Legal Framework For Reviewing One-Person, One-Vote Claims 44

CONCLUSION 50

TABLE OF CITED AUTHORITIES

Page

CASES

Abate v. Mundt,
403 U.S. 182 (1971) 48

Baker v. Carr,
369 U.S. 186 (1962) ..... *passim*

Bd. of Estimate v. Morris,
489 U.S. 688 (1989) 27

Branch v. Smith,
538 U.S. 254 (2003) 31

Brown v. Thomson,
462 U.S. 835 (1983) ..... *passim*

Buckley v. Valeo,
424 U.S. 1 (1976) 17, 40

Burns v. Richardson,
384 U.S. 73 (1966) ..... *passim*

Carlson v. Wiggins,
675 F.3d 1134 (8th Cir. 2012) 47

Chapman v. Meier,
420 U.S. 1 (1975) 49

Chen v. City of Houston,
121 S. Ct. 2020 (2001) 34, 36

Cited Authorities

Page

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2000) ..... *passim*

Colegrove v. Green,
328 U.S. 549 (1946) 30

Connor v. Finch,
431 U.S. 407 (1977) 8, 28, 47

Daly v. Hunt,
93 F.3d 1212 (4th Cir. 1996) 13, 30, 47

Davis v. Bandemer,
478 U.S. 109 (1986) 31

Davis v. Perry,
No. 11-cv-788 (W.D. Tex.) 6, 7

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961) 40

Gaffney v. Cummings,
412 U.S. 735 (1973) 47

Garza v. Cty. of Los Angeles,
918 F.2d 763 (9th Cir. 1990) ..... *passim*

Gray v. Sanders,
372 U.S. 368 (1963) ..... *passim*

Cited Authorities

Page

Hadley v. Junior Coll. Dist.,
397 U.S. 50 (1970) ..... *passim*

Harris v. Ariz. Indep. Comm'n,
No. 14-232 (S. Ct.) 47

Karcher v. Daggett,
462 U.S. 725 (1983) 41, 47, 48

Kirkpatrick v. Preisler,
394 U.S. 526 (1969) 39

League of Women Voters v.
Nassau Cty. Bd. of Supervisors,
737 F.2d 155 (2d Cir. 1984) 26

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 39

Luther v. Borden,
48 U.S. (7 How.) 1 (1849) 41

Mahan v. Howell,
410 U.S. 315 (1973) 18, 47, 49

Neitzke v. Williams,
490 U.S. 319 (1989) 14

Perry v. Perez,
132 S. Ct. 934 (2012) 6, 49

Cited Authorities

Page

Reynolds v. Sims,
377 U.S. 533 (1964)..... *passim*

Roman v. Sincock,
377 U.S. 695 (1964).....45-46

Shelby Cty. v. Holder,
133 S. Ct. 2612 (2013).....5

Snowden v. Hughes,
321 U.S. 1 (1944).....30

Terrazas v. Clements,
581 F. Supp. 1319 (N.D. Tex. 1983).....4

United Mine Workers v. Pennington,
381 U.S. 657 (1965).....40

Wesberry v. Sanders,
376 U.S. 1 (1964)..... 23, 25

White v. Regester,
412 U.S. 755 (1973).....8

WMCA, Inc. v. Lomenzo,
238 F. Supp. 916 (S.D.N.Y. 1965), *aff'd*, 27, 38
382 U.S. 4 (1965).....27, 28

Yick Wo v. Hopkins,
118 U.S. 356 (1886).....41

Page

STATUTES AND OTHER AUTHORITIES

U.S. Const., amend. I ..... *passim*

U.S. Const., amend. XIV 1, 2, 6

U.S. Const., amend. XIV, § 1 1

U.S. Const., amend. XIV, § 2 ..... 42, 43

U.S. Const., amend. XV 6

U.S. Const., art. I, § 2, cl. 3 43

28 U.S.C. § 1253.....1

28 U.S.C. § 2284.....13

28 U.S.C. § 2284(a) 1

42 U.S.C. § 1973c.....5

42 U.S.C. § 1983.....2, 13

Tenn. Const. art. II, § 5 20

Tex. Const. art. III 3, 4, 26, 39

Tex. Att'y Gen. Op. No. MW-350, 1981 WL 140035 (1981) 4

Cited Authorities

Page

Data for 2011 Redistricting in Texas – Addendum on Citizenship Data, Texas Legislative Council.....5

Data for 2011 Redistricting in Texas, Texas Legislative Council (Feb. 2011).....5

H.J.R. No. 75, § 1.01.....4

Scot A. Reader, *One Person, One Vote Revisited: Choosing A Population Basis to Form Political Districts*, 17 Harv. J.L. & Pub. Pol'y 521 (1994).....44

BRIEF FOR APPELLANTS

Appellants Sue Evenwel and Edward Pfenninger ("Appellants") respectfully request that this Court reverse the judgment of the U.S. District Court for the Western District of Texas.

OPINION BELOW

The district court's opinion is unreported and is reprinted in the Jurisdictional Statement's Appendix ("J.S. App.") at 3a-14a.

JURISDICTION

This case was properly before a three-judge district court pursuant to 28 U.S.C. § 2284(a) because it involves a constitutional challenge to a statewide redistricting plan. The U.S. District Court for the Western District of Texas entered final judgment against Appellants on November 5, 2014, thereby denying their request for a permanent injunction. J.S. App. 15a-16a. Appellants filed a timely notice of appeal on December 4, 2014. J.S. App. 1a. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall ... deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

INTRODUCTION

This is an appeal from a three-judge district court decision dismissing Appellants' constitutional challenge to a Texas Senate apportionment plan. That plan (Plan S172) created Senate districts with approximately equal total populations (*i.e.*, all persons counted in the decennial Census) but with gross disparities in voting populations (*i.e.*, all persons eligible to vote). Appellants, who reside in Senate districts significantly overpopulated with eligible voters, brought this action pursuant to 42 U.S.C. § 1983 on the ground that Plan S172 violated the one-person, one-vote rule of the Fourteenth Amendment. Appellants alleged that Plan S172 violates the one-person, one-vote rule because "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 56 (1970).

The district court dismissed Appellants' complaint for failing to state a claim on the ground that Texas's choice of a population base (*i.e.*, total population instead of voter population) is not judicially reviewable. The court reached that conclusion even though doing so abdicated any judicial responsibility to ensure the votes of eligible voters in one part of Texas are approximately equal in weight to those of eligible voters in another part of the State. This Court, however, long ago settled the political-question issue in favor of justiciability. If the district court were correct, the Texas Legislature could have adopted a Senate map containing 31 districts of equal total population without violating the one-person, one-vote rule—even if 30 of the

districts each contained one eligible voter and the 31st district contained every other eligible voter in the State. That cannot be right.

The Court therefore must decide whether the one-person, one-vote rule protects the right of eligible voters to have an equal vote. If it does, then the judgment below cannot stand. To be sure, the Constitution affords States wide latitude to consider an array of policy factors, including the representational interest of non-voters, when apportioning districts. But that discretion is not limitless. It must be exercised in a fashion that guarantees the individual right to an equal vote that eligible voters hold under the one-person, one-vote rule. Texas breached that fundamental obligation in creating these Senate districts. Plan S172's massive and arbitrary malapportionment of eligible voters is patently unconstitutional. The district court's judgment should be reversed.

STATEMENT

I. The Texas Senate Redistricting

The one-person, one-vote rule requires States and localities to revise their apportionment schemes every ten years to account for population shifts and changes. *See Reynolds v. Sims*, 377 U.S. 533, 583-84 (1964). To that end, the Texas Constitution requires the Texas Legislature to reapportion voting districts for the Texas Senate at its first regular session following the publication of each federal decennial Census. Tex. Const. art. III, § 28. The Texas Constitution further provides that "[t]he State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator."

Id. art. III, § 25. Texas law does not otherwise set forth substantive criteria to govern the decennial redistricting process.

Notably, the Texas Constitution previously required that "[t]he State shall be divided into Senatorial Districts of contiguous territory according to the number of qualified electors ... and no single county shall be entitled to more than one Senator." Tex. Const. art. III, § 25 (2000). The Texas Constitution's "no more than one Senator" per county rule was clearly unconstitutional after *Reynolds*. *See infra* at 24-26. In 1981, the Texas Attorney General opined that the formation of Senate districts according to the number of qualified electors also was "unconstitutional on its face as inconsistent with the federal constitutional standard." Tex. Att'y Gen. Op. No. MW-350, 1981 WL 140035, at *2 (1981); *see also Terrazas v. Clements*, 581 F. Supp. 1319, 1328 (N.D. Tex. 1983) (advancing the same position in litigation). In 2001, both the "qualified electors" and "no more than one Senator" provisions were deemed obsolete and removed from the Texas Constitution. *See* H.J.R. No. 75, § 1.01.

Following the 2010 Census, the Texas Legislature undertook the task of reapportioning voting districts for the Texas Senate. To accomplish this task, the Legislature relied on the Texas Legislative Council, a nonpartisan legislative agency, to compile the data needed to draw Senate districts. Specifically, the Council provided three sets of data: (1) population data from the Census Bureau and the American Community Survey ("ACS"), including total population, voting age population ("VAP"), and citizen voting age population ("CVAP"); (2) Census Bureau geographic data, including digitized maps, data

concerning county election precincts, census tract and census block information, and reports concerning various features of existing districts; and (3) State-collected data, including voter registration, voter turnout, and election returns.[1]

Despite the availability of all this information, the Texas Legislature redrew the Senate map without attempting to ensure that each Senate district has approximately the same number of eligible voters. As a consequence, the Senate redistricting plan ("Plan S148") formed districts that, although roughly equal in terms of total population, were grossly malapportioned in terms of eligible voters. *See* Brief Amicus Curiae of Edward Chen, et al., *Perry v. Perez*, No. 11-713 (Dec. 28, 2011). On June 17, 2011, then-Governor Perry signed into law H.B. 150, which contained Plan S148, as well as the congressional and Texas House plans.

Plan S148 did not take effect, however, because Section 5 of the Voting Rights Act ("VRA") required Texas to obtain "preclearance" from the Attorney General or the U.S. District Court for the District of Columbia before it could implement any new voting law. *See* 42 U.S.C. § 1973c, *declared unconstitutional in part by Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013). In July 2011, Texas filed a declaratory judgment action before a three-judge district court in Washington D.C. seeking Section 5 preclearance of Plan S148.

---

1. *See Data for 2011 Redistricting in Texas*, Texas Legislative Council (Feb. 2011), http://www.tlc.state.tx.us/redist/pdf/Data_2011_Redistricting.pdf; *Data for 2011 Redistricting in Texas – Addendum on Citizenship Data*, Texas Legislative Council, http://www.tlc.state.tx.us/redist/pdf/CitizenshipAddendum.pdf.

Two months later, various plaintiffs filed a federal action in Texas to enjoin Plan S148. *See Davis v. Perry*, No. 11-cv-788 (W.D. Tex.). The plaintiffs claimed that because Plan S148 had not (and likely would not) receive Section 5 preclearance, the court should enjoin it and create a new plan for the upcoming Senate elections. The plaintiffs also challenged Plan S148 under Section 2 of the VRA, as well as under the Fourteenth and Fifteenth Amendments. To that end, they alleged that Plan S148 "illegally dilute[d] the voting rights of minority voters (African Americans and Latinos) in the Dallas and Tarrant counties region of North Texas," and argued that the district court should, for that reason, enjoin Plan S148 "[i]n the unlikely event that Section 5 preclearance is obtained." *Id.*, Doc. 1 at 12-13. The plaintiffs specifically claimed that Plan S148 diluted their votes because "the entire north Texas region contains only one district SD23 that allows minority citizens the opportunity to elect their candidate of choice" even though the Dallas-Tarrant minority population was "sufficiently large and geographically compact to comprise the majority of citizen voting age persons in at least two state senate districts." *Id.* at 11.

A three-judge panel of the U.S. District Court for the Western District of Texas agreed with the plaintiffs that it was unlikely Plan S148 would receive preclearance in time for the 2012 Senate elections, and it created an interim map (Plan S164) to govern those elections. *See id.*, Docs. 8, 89. Texas appealed directly to this Court. On expedited review, the Court vacated Plan S164. *See Perry v. Perez*, 132 S. Ct. 934 (2012). This Court instructed the district court to use Plan S148 as its "starting point" on remand and to depart only from those aspects of Plan S148 that stood "a reasonable probability of failing to gain § 5 preclearance." *Id.* at 941-42.

On remand, the district court held a bench trial to evaluate Plan S148 in light of this Court's instructions and to examine the parties' competing interim Senate plans. In drawing their maps, both parties relied on the Texas Legislative Council's CVAP data. *See Davis*, No. 11-cv-788, Doc. 137 at 16; Doc. 127, Ex. 1; Doc. 73-8 at 19; Doc. 56-11; *see also id.* Doc. 178 (later requesting in a consolidated case that new ACS citizenship data be admitted into evidence because "the most often relied upon evidence [in vote dilution cases] is ... census data that estimate[] citizen voting age population" and because "the updated ACS citizenship data would be relevant and admissible" (adopting by reference Joint Memorandum, *Perez v. Texas*, No. 11-cv-360, Doc. 756)).

After finding that aspects of Plan S148 stood "a reasonable probability of failing to gain §5 preclearance," the district court created a new interim Senate plan (Plan S172) for the 2012 elections. *Id.*, Docs. 141, 147. In drawing Plan S172, the district court likewise relied on the Texas Legislative Council's voting data and expertise. *See id.*, Docs. 19, 175. The court appointed Texas Legislative Council employees as technical advisors to assist it in understanding and operating the Council's redistricting software and extensively relied on the Council's data to redraw the Senate map. *See id.*

On June 21, 2013, the Texas Legislature passed a bill repealing Plan S148 and permanently adopting Plan S172. Governor Perry signed the bill on June 26, 2013. Because Texas no longer needed to secure Section 5 preclearance, Plan S172 took effect immediately. The Texas Legislature, in enacting Plan S172, once again had available to it the Texas Legislative Council's extensive data, which included

the number of eligible and registered voters in each Senate district under various statistical metrics. *See* J.S. App. 26a-30a; Supplemental Jurisdiction Statement Appendix ("Supp. J.S. App.") 1-12. Yet, the Texas Legislature again drew Senate districts that, while roughly equal in terms of total population, were grossly malapportioned in terms of eligible voters.

Table 1 below shows the voting population deviations from the "ideal" Senate district using Texas's own data. The "ideal" Senate district is the total relevant population statewide, divided by 31 (the number of Senate districts). For example, the statewide Texas CVAP from the 2007-2011 ACS survey was 15,581,580. Supp. J.S. App. 9. The "ideal" Senate district therefore would contain 502,632 citizens of voting age. The percentage deviation is derived by adding the maximum upward and downward percentage deviations from the "ideal" district. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835, 842, 846 (1983); *Connor v. Finch*, 431 U.S. 407, 416-18 (1977); *White v. Regester*, 412 U.S. 755, 761, 764 (1973). As Table 1 demonstrates, Plan S172 deviates from the "ideal" district by roughly 46% to 55% depending on which voter-based metric is utilized.

TABLE 1

Population Deviations from the Ideal Senate District Under S172

Voter Metric	Percentage Deviation from Ideal District
Citizen Voting Age Population (2005-2009)	47.87%
Citizen Voting Age Population (2006-2010)	46.77%
Citizen Voting Age Population (2007-2011)	45.95%
Total Voter Registration[2] (2008)	51.14%
Total Voter Registration (2010)	55.06%
Non-Suspense Voter Registration[3] (2008)	51.32%
Non-Suspense Voter Registration (2010)	53.66%

2. "Total voter registration is the total number of all persons who are on a county's voter registration roll." Texas Legislative Council Glossary, Texas Redistricting, http://www.tlc.state.tx.us/redist/glossary/glossary.html.

3. "Non-suspense voter registration is total voter registration minus the number of previously registered voters who fail to respond to a confirmation of residence notice sent by the county voter registrar." *Id.*

II. Appellants' Districts

Sue Evenwel is a United States citizen who resides in Titus County, Texas. Ms. Evenwel is a registered voter who votes in Senate District 1 under Plan S172. She regularly votes in Texas Senate elections and plans to do so in the future. J.S. App. 19a-20a.

Edward Pfenninger is a United States citizen who resides in Montgomery County, Texas. Mr. Pfenninger is a registered voter who votes in Senate District 4 under Plan S172. He regularly votes in Texas Senate elections and plans to do so in the future. *Id.* at 20a.

Appellants live in Senate districts among the most overpopulated with eligible voters under Plan S172. *See* J.S. Supp. App. 5, 7, 9, 11-12. The tables below compare the number of eligible voters and registered voters in Senate District 1 and 4, respectively, to the Senate District with the lowest number of eligible voters and registered voters. These comparisons are expressed both as a percentage deviation from the ideal district and as a ratio of relative voting strength (*viz.*, comparing the voting power a District 1 or District 4 voter holds to the voting power a voter in the "low Senate district" holds).

As Table 2 and Table 3 show, there are eligible voters with substantially more voting power than Appellants; eligible voters from certain Senate districts hold votes weighing approximately one-and-one-half times Appellants' votes (or more depending on the relevant voter metric). For example, as measured by CVAP (2005-2009), the vote of an eligible voter in District 27 (the low Senate district) is 1.56 times more powerful than the vote of an eligible voter in District 1 (where Ms. Evenwel resides).

TABLE 2

SENATE DISTRICT 1 DEVIATION AND VOTING POWER

Voter Metric	Senate District 1	Low Senate District	Absolute Difference	Percentage Deviation from Ideal District	Voting Power
Citizen Voting Age Population (2005-2009)	557,525	358,205	199,320	41.49%	1:1.56
Citizen Voting Age Population (2006-2010)	568,780	367,345	201,435	40.88%	1:1.55
Citizen Voting Age Population (2007-2011)	573,895	372,420	201,475	40.08%	1:1.54
Total Voter Registration (2008)	513,259	297,692	215,567	49.23%	1:1.72
Total Voter Registration (2010)	489,990	290,230	199,760	46.69%	1:1.69
Non-Suspense Voter Registration (2008)	437,044	256,879	180,165	47.76%	1:1.84
Non-Suspense Voter Registration (2010)	425,248	252,087	173,161	47.23%	1:1.69

TABLE 3

SENATE DISTRICT 4 DEVIATION AND VOTING POWER

Voter Metric	Senate District 4	Low Senate District	Absolute Difference	Percentage Deviation from Ideal District	Voting Power
Citizen Voting Age Population (2005-2009)	506,235	358,205	148,030	30.81%	1:1.41
Citizen Voting Age Population (2006-2010)	521,980	367,345	154,635	31.38%	1:1.42
Citizen Voting Age Population (2007-2011)	533,010	372,420	160,590	31.95%	1:1.43
Total Voter Registration (2008)	468,949	297,692	171,257	39.11%	1:1.58
Total Voter Registration (2010)	466,066	290,230	175,836	41.10%	1:1.61
Non-Suspense Voter Registration (2008)	409,923	256,879	153,044	40.57%	1:1.60
Non-Suspense Voter Registration (2010)	406,880	252,087	154,793	42.22%	1:1.61

III. Proceedings Below

Ms. Evenwel and Mr. Pfenninger ("Appellants") filed suit in the U.S. District Court for the Western District of Texas pursuant to 42 U.S.C. § 1983. Appellants challenged Plan S172 as violating the one-person, one-vote rule of the Equal Protection Clause and requested a permanent injunction against its further enforcement. J.S. App. 34a. A three-judge district court was convened to hear the suit in accordance with 28 U.S.C. § 2284. Appellees ("Texas") moved to dismiss the complaint, while Appellants sought summary judgment. The district court stayed summary-judgment briefing pending resolution of the motion to dismiss.

On November 5, 2014, the district court granted the motion to dismiss. J.S. App. 3a-14a. The court recognized that the "crux of the dispute is Plaintiffs' allegation that the districts vary widely in population when measured using various voter-population metrics." *Id.* at 5a. But the district court rejected the claim, relying primarily on *Burns v. Richardson*, 384 U.S. 73 (1966). In the district court's view, the choice of which population base to use in apportioning districts is "left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." J.S. App. 13a (citing *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996)).

In particular, the district court held that "the decision whether to exclude or include individuals who are ineligible to vote from an apportionment base 'involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.'" *Id.*

at 11a (quoting *Burns*, 384 U.S. at 92) (emphasis omitted). The district court held that Appellants' claim that Texas must equally apportion the population of eligible voters among the Senate districts was judicially unreviewable and dismissed the lawsuit for failure to state a claim. In the district court's judgment, Appellants had raised "'a close but ultimately unavailing [legal theory].'" *Id.* at 14a (quoting *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (alteration in original)).

This timely appeal followed. On May 26, 2015, the Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

The key issue this case raises is whether the one-person, one-vote rule protects the right of eligible voters to an equal vote or, as the district court held, the choice of a population base is unreviewable no matter how much vote dilution it causes. The answer is clear—the one-person, one-vote rule protects eligible voters. Beginning with *Baker v. Carr*, 369 U.S. 186 (1962), and culminating in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court held that: (1) an equal-protection challenge to a State apportionment plan is not a political question; (2) standing to bring such a claim is founded on the right to vote; and (3) a legislative apportionment plan that dilutes the vote of an eligible voter based on where he lives violates the one-person, one-vote rule. "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Reynolds*, 377 U.S. at 568. The Court need not look beyond these seminal decisions to resolve the question presented in Appellants' favor.

As a result, the "population" States must equalize for one-person, one-vote purposes is the population of eligible voters. That does not mean that every State must cease using decennial Census figures to draw districts. Total population data often protect the one-person, one-vote rights of eligible voters because non-voters typically are evenly distributed throughout a given jurisdiction. But as this case demonstrates, that is not always true. When total population figures do not protect eligible voters, demographic data that ensures "the vote of any citizen is approximately equal in weight to that of any other citizen in the State" must be used in the apportionment process. *Id.* at 579.

The district court's conclusion that this type of one-person, one-vote claim is nonjusticiable because it would lead federal courts too far into the political thicket is untenable. It outright repudiates *Baker* and *Reynolds*. In those decisions, the Court held that equal-protection claims are judicially reviewable irrespective of whether they draw the Court into issues with a political dimension. It cannot be that a State's choice between a geographic or population basis is justiciable when it implicates the rights of eligible voters but nonjusticiable when the choice between different population bases reproduces that same injury. None of the Court's one-person, one-vote decisions supports such a distinction.

The district court thought that *Burns v. Richardson*, 384 U.S. 73 (1966), compelled this conclusion. But *Burns* did not decide this issue. There, Hawaii had chosen registered voters as its apportionment base in order to equalize voting power because a large number of people counted in the Census (mostly military personnel and

seasonal tourists) were not Hawaii voters. The Court upheld that choice, concluding that States are not required to use total population as the apportionment base when it would produce "a substantially distorted reflection of the distribution of state citizenry." *Id.* at 94. *Burns* thus does not support the district court's conclusion that States may use total population as an apportionment base when it *does* dilute the vote of those eligible to cast a ballot. The Court's skeptical review of Hawaii's reliance on registered-voter data as a proxy for the number of eligible voters proves the point. That probing inquiry would have been forbidden if *Burns* held, as the district believed, that a State's choice of a population basis is immune from judicial review.

Unlike the district court, the Ninth Circuit has held that this type of one-person, one-vote claim is reviewable but unsustainable on the merits. *See Garza v. Cty. of Los Angeles*, 918 F.2d 763, 782 (9th Cir. 1990) According to the Ninth Circuit, the one-person, one-vote rule cannot require equal distribution of eligible voters because that would dilute the "access" of residents to their elected representatives in districts with larger numbers of non-voters in violation of the Equal Protection Clause and the Petition Clause of the First Amendment. This novel "equal access" theory fails on every level.

As an equal protection matter, *Burns* forecloses it. If the one-person, one-vote rule required States to ensure equal access instead of equal voting power, Hawaii's plan would have been unconstitutional. But the reason why *Burns* did not invalidate Hawaii's plan is because the one-person, one-vote rule *does* "insure that each person's vote counts as much, insofar as it is practicable, as any other person's." *Hadley*, 397 U.S. at 54. The

Court anticipated that population-based districting on the State and local level would enhance representational interests as a byproduct of voter equality—not at its direct expense. It cannot be that voter equality is subordinate to representational interests. Otherwise, non-voters would have standing to bring a one-person, one-vote challenge to an apportionment plan that equally distributes eligible voters. There is no support for such a radical position.

The First Amendment rationale is no stronger. The Petition Clause ensures individuals are not unreasonably restrained in seeking redress from the government. Thus, constituents have every right to contact their elected representative, and nothing about a one-person, one-vote rule that protects eligible voters takes that right away from them. That does not mean, however, that the First Amendment includes a right to *equal* access. The Petition Clause no more guarantees constituents equal access to their elected representatives to seek to influence how tax dollars are spent than the Free Speech Clause equalizes their "*relative* ability" to seek to "influence the outcome of elections." *Buckley v. Valeo*, 424 U.S. 1, 48 (1976) (emphasis added). Simply put, the First Amendment does not enshrine the comparative right the Ninth Circuit wielded to collaterally attack a voter-based conception of the one-person, one-vote rule.

Last, the Fifth Circuit has suggested that equalizing voter population would conflict with the Constitution's allocation of seats in the House of Representatives based on total population. But the Court rejected the "so-called federal analogy" when Georgia tried to defend its version of the Electoral College in *Gray v. Sanders*, 372 U.S. 368 (1963), and in *Reynolds* when Alabama tried to

defend its system as modeled on the U.S. Senate. The federalism-based concerns that drove the Framers to apportion House seats across States in the way they did sheds no light on the one-person, one-vote considerations underlying how districts are shaped within States. Analogies cannot overcome a simple truth: *Baker* and *Reynolds* are foundational cases that stand on their own and the district court's decision cannot be reconciled with them.

However, the fact that the "population" of eligible voters must be given "controlling consideration," *Reynolds*, 577 U.S. at 581, in the one-person, one-vote equation does not mean that States have no latitude to take other policy factors into consideration. The Court has always been aware of the need for States to take into account an array of factors beyond one-person, one-vote compliance when drawing districts (integrity of political subdivisions and district compactness, for example). Representational equality is another such interest; indeed, under certain conditions a State's desire to accommodate both total and voter population might afford it somewhat more latitude than would otherwise be appropriate.

What Texas may not do, though, is leverage policy considerations to deny eligible voters their fundamental right to an equal vote. That is the whole point of *Reynolds*. But, here, the Texas Legislature did not even make a good-faith effort to draw Senate districts with approximately equal numbers of eligible voters. And, Plan S172's voter-population deviations are too large to be defensible in any event. Deviations nearing 20% are *per se* unconstitutional. *See Mahan v. Howell*, 410 U.S. 315, 329 (1973). The deviations here range from 30% to 50% depending on which district is analyzed and which voter-based metric is

used. Texas's malapportionment of eligible Senate voters is especially egregious because it could have substantially reconciled both total and voter population.

This appeal need not resolve every implementation issue. As in *Reynolds*, the Court should, at a minimum, provide enough guidance to ensure that the individual right to an equal vote is respected. At the end of the day, that means there must be "some outer limit to the magnitude of the deviation that is constitutionally permissible even in the face of the strongest justifications." *Brown v. Thomson*, 462 U.S. 835, 849-50 (1983) (O'Connor, J., concurring). Because if there is not, "the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired." *Reynolds*, 377 U.S. at 581.

ARGUMENT

I. Plan S172 Violates The One-Person, One-Vote Rule Of The Equal Protection Clause.

From the beginning, the fundamental purpose of the one-person, one-vote principle has been to ensure that the States apportion districts in a way that protects the right of eligible voters to an equal vote. It necessarily follows that requiring the States to apportion approximately the same number of eligible voters to each district is the only way to enforce that constitutional right.

In a series of pathbreaking cases, this Court held that the Equal Protection Clause includes a "one-person, one-vote" rule. Initially, in *Baker v. Carr*, 369 U.S. 186 (1962), the Court held that an equal-protection challenge to the

Tennessee Legislature's apportionment of seats in the General Assembly presented a justiciable federal question "by virtue of the debasement of [the plaintiffs'] votes." *Id.* at 187-88 (internal quotation marks omitted). The Court premised that holding on three distinct legal conclusions.

First, the Court held that "the cause of action is one which 'arises under' the Federal Constitution." *Id.* at 199. Tennessee apportioned seats in the General Assembly among its counties "'according to the number of qualified voters in each.'" *Id.* at 188-89 (quoting Tenn. Const. art. II, § 5). The plaintiffs did not oppose the use of "qualified voters" as Tennessee's apportionment base. They contested Tennessee's refusal to reapportion the General Assembly given the "substantial growth and redistribution of her population" that had occurred between 1901 and 1961. *Id.* at 192-94. In particular, the complaint alleged that the Tennessee Legislature's refusal to reapportion the General Assembly despite the fact that "[t]he relative standings of the counties in terms of qualified voters [had] changed significantly" violated the Equal Protection Clause. *Id.* The Court ruled that "[a]n unbroken line of ... precedents sustains the federal courts' jurisdiction of the subject matter of federal constitutional claims of this nature." *Id.* at 201.

Second, the Court sustained the plaintiffs' standing to bring this federal claim. They were "qualified to vote for members of the General Assembly" and had sued "'on their own behalf and on behalf of all qualified voters of their respective counties, and further, on behalf of all voters of the State of Tennessee who [were] similarly situated.'" *Id.* at 204-05 (citation omitted). The Court found that the plaintiffs, as Tennessee voters, had a "personal stake in

the outcome of the controversy." *Id.* at 204. The claimed "injury" giving rise to standing was being subject to an apportionment plan that "disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality *vis-à-vis* voters in irrationally favored counties." *Id.* at 207-08. The plaintiffs accordingly had asserted "a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the Government be administered according to law." *Id.* at 208 (citations and internal quotation marks omitted). In sum, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *Id.* at 206.

Third, and last, the Court held that such a "challenge to an apportionment presents no nonjusticiable 'political question.'" *Id.* at 209. There was no impediment to judicial review because "it is the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States, which gives rise to the 'political question.'" *Id.* at 210. The lawsuit, moreover, did not "ask the Court to enter upon policy determinations for which judicially manageable standards are lacking" because "[j]udicial standards under the Equal Protection Clause are well developed and familiar." *Id.* at 226. In sum, the plaintiffs' "allegations of a denial of equal protection present[ed] a justiciable constitutional cause of action" because "[t]he right asserted [was] within the reach of judicial protection under the Fourteenth Amendment." *Id.* at 237.

Although *Baker* decided that a voter's challenge to an apportionment scheme is justiciable, it did not

resolve the claim's merits. The Court first addressed that question in *Gray v. Sanders*, 372 U.S. 368 (1963). There, the plaintiff, who was "qualified to vote in primary and general elections," brought an equal-protection challenge to "Georgia's county unit system as a basis for counting votes in a Democratic primary for the nomination of a United States Senator and statewide officers." *Id.* at 370. Georgia's county unit voting system was modeled on the Electoral College; subject to certain exceptions, then, a candidate for statewide office received a county's entire share of the nomination votes by winning the popular vote in that county. *See id.* at 370-71.[4] But because the county's share of the nomination votes was not precisely tied to its population, Georgia's smaller, rural counties inevitably possessed outsized influence over the electoral result. *See id.* at 371-72.

The Court found that the plaintiff, "like any person whose right to vote is impaired, has standing to sue." *Id.* at 375 (citation omitted). As to the merits, the case was straightforward. "Every voter's vote is entitled to be counted once." *Id.* at 380. "Georgia gives every qualified voter one vote in a statewide election; but in counting those votes she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties." *Id.* at 379. That was unconstitutional. "Once the geographical unit

---

4. Under Georgia's unit system, each county was allotted two "units" and then would receive "an additional ... unit ... for the next 5,000 persons; an additional unit for the next 10,000 persons; another unit for each of the next two brackets of 15,000 persons; and, thereafter, two more units for each increase of 30,000 persons." *Gray*, 372 U.S. at 372.

for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex and ... wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment." *Id.*

In reaching this conclusion, the Court emphasized the equal-voting-power principle's deep constitutional roots. "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." *Id.* at 379-80; *see also id.* ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions."). "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Id.* at 381.

In *Wesberry v. Sanders*, 376 U.S. 1 (1964), the Court applied the one-person, one-vote rule to a State legislative apportionment plan for the first time. The plaintiffs, who were "citizens and qualified voters," challenged Georgia's congressional map on the ground that "population disparities deprived them and voters similarly situated of a right under the Federal Constitution to have their votes for Congressman given the same weight as the votes of other Georgians." *Id.* at 2-3. As an initial matter, the Court extended *Baker* to congressional districting. Thus, "state congressional apportionment laws which debase a citizen's right to vote" are subject to challenge on equal protection grounds. *Id.* at 5-6.

On the merits, the Court determined that the one-person, one-vote rule applies with equal force to legislative apportionment. The Court explained that, after *Gray*, it is not possible "to suggest that in ... statewide elections the votes of inhabitants of some parts of a State ... could be weighted at two or three times the value of the votes of people living in more populous parts of the State." *Id.* at 8. The Court would not "permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants." *Id.* Accordingly, "it was population which was to be the basis of the House of Representatives." *Id.* at 8-9. Georgia's congressional map could not survive judicial review under this standard. *See id.* at 7 ("If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand.").

Last, *Reynolds v. Sims*, 377 U.S. 533 (1964), applied the one-person, one-vote rule to Alabama's apportionment plans for both houses of its legislature. The plaintiffs, voters proceeding "[on] their own behalf and on behalf of all similarly situated Alabama voters," challenged the plans under the Equal Protection Clause. *Id.* at 537. As a result, the district court sustained the plaintiffs' standing, *see id.* at 542, and that ruling was not challenged. The sole focus in this Court was the merits of the plaintiffs' claim.

To begin, the Court reiterated that the Constitution "protects the right of all qualified citizens to vote, in state as well as in federal elections," and that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 554-

55. The Court therefore understood precedent to center on the constitutional rights of eligible voters. Per *Baker*, an equal-protection challenge to "a State's apportionment of seats in its legislature, on the ground that the right to vote of certain citizens was effectively impaired since debased and diluted, in effect presented a justiciable controversy." *Id.* at 556-57. Per *Gray*, "the Georgia county unit system" was "unconstitutional since it resulted in a dilution of the weight of the votes of certain Georgia voters merely because of where they resided." *Id.* at 557. And, per both *Gray* and *Wesberry*, under the one-person, one-vote rule "one person's vote must be counted equally with those of all other voters in a State." *Id.* at 560.

Faithfully applying these cases, *Reynolds* held that "the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote." *Id.* at 561. Guaranteeing the constitutional right to an equal vote meant that "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside" could not be tolerated. *Id.* at 563; *see also id.* at 566 ("Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, or economic status.") (internal citations omitted). As to "allocation of legislative representation," then, "all voters, as citizens of a State, stand in the same relation regardless of where they live." *Id.* at 540, 565.

Reynolds thus held that the one-person, one-vote rule "requires that the seats in both houses of a bicameral

state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired *when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.*" *Id.* at 568 (emphasis added). Because neither of the Alabama Legislature's houses had been apportioned on a population basis (as opposed to a geographic basis), the existing and proposed substitute plans were all unconstitutional. *See id.* at 571-72.

Together, these cases compel the conclusion that the "population" that must be equalized for purposes of the one-person, one-vote rule is the number of eligible voters in the geographic area from which districts are to be apportioned. In each case, it was the plaintiffs' status as eligible voters that supplied the foundation for Article III standing. In each case, it was the denial of their right to an equally weighted vote that injured them under the Equal Protection Clause.[5] And, ultimately, in each case the Court remedied that constitutional violation by requiring the State to apportion districts in a fashion that ensured equal voting power.

That is precisely why the Court has held that "when members of an elected body are chosen from separate districts, each district must be established on a basis that

---

5. Being an eligible voter is necessary but not sufficient to establish injury. Eligible voters from *underpopulated* districts do not have standing for the same reason that non-voters lack standing: neither has suffered vote dilution. *See, e.g., League of Women Voters v. Nassau Cty. Bd. of Supervisors*, 737 F.2d 155, 161 (2d Cir. 1984) (holding that "as voters from overrepresented municipalities, these plaintiffs cannot claim any injury").

will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley*, 397 U.S. at 56; *see also Bd. of Estimate v. Morris*, 489 U.S. 688, 701 (1989) ("In calculating the deviation among districts, the relevant inquiry is whether 'the vote of any citizen is approximately equal in weight to that of any other citizen.'") (quoting *Reynolds*, 377 U.S. at 579). This can mean only one thing: the one-person, one-vote rule protects the right of eligible voters to an equal vote. *See Garza v. Cty. of Los Angeles*, 918 F.2d 763, 782 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) ("[T]he name by which the Court has consistently identified this constitutional right—one person one vote—is an important clue that the Court's primary concern is with equalizing the voting power of electors, making sure that each voter gets one vote—not two, five or ten.") (citation omitted).

No doubt the Court has been "somewhat evasive in regard to which population must be equalized." *Chen v. City of Houston*, 206 F.3d 502, 524 (5th Cir. 2000). But the imprecision stemmed from the lack of any need for further refinement. In the 1960s, the distribution of the voting population generally did not deviate from the distribution of total population to the degree necessary to raise this issue. *See, e.g., WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916, 925 (S.D.N.Y. 1965) (noting that "a change from the citizen base to a resident base for legislative apportionment would have but little impact on the densely populated areas of New York State"), *aff'd*, 382 U.S. 4 (1965).[6] "Absent

6. *Burns v. Richardson*, 384 U.S. 73 (1966), could have raised the issue, but Hawaii used registered voters to apportion districts and that choice was upheld; the Court thus was not called upon to decide the question presented here. *See infra* at 32-35.

significant demographic variations in the proportion of voting age citizens to total population, apportionment by population will assure equality of voting strength and vice versa." *Garza*, 918 F.2d at 781 (Kozinski, J., concurring and dissenting in part). Even today, "eligible voters will frequently track the total population evenly." *Chen*, 206 F.3d at 525.

That should not in any way distract, however, from the fact that the "consistent theme" of the Court's one-person, one-vote "decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement." *Hadley*, 397 U.S. at 54. The Court has always understood, as a consequence, that "the overriding objective must be substantial equality of population among the various districts, *so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.*" *Reynolds*, 377 U.S. at 579 (emphasis added); *see also Connor v. Finch*, 431 U.S. 407, 416 (1977) ("The Equal Protection Clause requires that legislative districts be of nearly equal population, *so that each person's vote may be given equal weight in the election of representatives.*") (emphasis added).

When the use of total population protects "the right of each qualified voter to participate on an equal footing in the election process," *Hadley*, 397 U.S. at 55, it is a perfectly acceptable basis for apportionment. But when, as here, total population figures do not "insure that each person's vote counts as much, insofar as it is practicable, as any other person's," *id.* at 54, demographic data that guarantees the equal-protection rights of eligible voters must be used to apportion districts. At all times, the one-person, one-vote right of eligible voters to an equal vote

must be the touchstone. That is what the *Baker/Reynolds* line of decisions requires.

II. No Theory The Lower Courts Have Relied On To Deny Eligible Voters An Equally Weighted Vote Is Sustainable.

The lower courts have relied on a variety of theories to reject the proposition that the one-person, one-vote rule protects eligible voters. First, the district court, among other courts, ruled that the State's choice of a population basis is judicially unreviewable. Second, the Ninth Circuit has ruled that the Equal Protection Clause and the First Amendment require States and localities to apportion based on total population in order to protect the right of all residents to "equal access" to their elected representatives. Third, the Fifth Circuit has suggested that apportioning State and local districts based on voter population might conflict with the way the Constitution apportions seats in the House of Representatives among the States. None of these rationales is sustainable.

A. The district court's conclusion that Texas's choice of a population basis is immune from judicial review conflicts with *Baker v. Carr* and *Reynolds v. Sims*.

Following the lead of the Fourth and Fifth Circuits, the district court dismissed the complaint, reasoning that the choice of an apportionment base is "left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." J.S. App. 13a. Subjecting the State's choice of an apportionment base to judicial review, according to these courts, "would lead

federal courts too far into the 'political thicket.'" *Daly*, 93 F.3d at 1227 (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (Frankfurter, J., concurring)); *see also Chen*, 206 F.3d at 528 (holding that "this eminently political question has been left to the political process"). The notion that a State's choice of an apportionment base is an unreviewable political question cannot be squared with this Court's one-person, one-vote decisions.

Baker definitively settled this issued a long time ago. *See supra* at 19-21. The fundamental point of the opinion was that the political-question doctrine could not insulate from an equal-protection challenge State apportionment of districts based on geography instead of population when that choice injured eligible voters. That the injury to eligible voters here results instead from the choice of one population basis over another is not a neutral basis for distinction. As in *Baker*, this federal challenge is "justiciable, and if 'discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.'" 369 U.S. at 209-10 (quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)).

If any doubt remained, however, *Reynolds* eliminated it by firmly rejecting the very reasoning the district court employed here:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to

> restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

377 U.S. at 566.

The bottom line is that, since *Baker*, the Court has "consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts." *Davis v. Bandemer*, 478 U.S. 109, 118 (1986). That seminal decision engendered strong dissents. But those dissents may not be relied upon to declare off limits the one-person, one-vote issue presented here. *Compare Chen*, 206 F.3d at 527 ("[W]e have some difficulty in reading the Equal Protection Clause to require the adoption of a particular theory of political equality."), *with Baker*, 369 U.S. at 300 (Frankfurter, J., dissenting) ("What is actually asked of the Court in this case is to choose ... among competing theories of political philosophy ...."). Having "crossed the Rubicon," *Branch v. Smith*, 538 U.S. 254, 278 (2003), and found an enforceable one-person, one-vote right in the Constitution, the Court cannot now claim that the matter is committed to the political process when enforcement is required.

That should have been the end of the road for the political-question doctrine with respect to this particular issue. The district court nevertheless held that *Burns v.*

Richardson, 384 U.S. 73 (1966), decided not even two years after *Reynolds*, decisively resolved this issue in favor of unreviewability. J.S. App. 10a-13a. No fair reading of *Burns* could lead to that conclusion.

In *Burns*, Hawaii had apportioned both houses of its legislature using registered voters as the population basis so as to exclude those, including military personnel and seasonal tourists, who were counted in the Census but not registered to vote in the State. 384 U.S. at 90-91. Although Hawaii's plan created deviations over 100% as to total population (*i.e.*, certain Hawaii districts contained twice as many residents as others), the districts had only minor deviations with respect to registered voters. *Id.* at 90-91 & n.18. The plan was challenged under the Equal Protection Clause on the ground that *Reynolds* required Hawaii to exclusively use total population as its apportionment base. *Id.* at 75, 93. The Court rejected the challenge.

The Court started from the "proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured." *Id.* at 91. "Although total population" was "in fact the basis of comparison" in *Reynolds*, that decision "carefully left open the question what population was being referred to" and "discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population." *Id.* "The decision to include or exclude any such group," the Court continued, "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere."

Id. at 92. "Unless a choice is one the Constitution forbids, the resulting apportionment base offends no constitutional bar, and compliance with" *Reynolds* "is to be measured thereby." *Id.* (citation omitted).

There was no reason to interfere with Hawaii's choice of registered voters given the case's circumstances. Under *Reynolds*, the Court explained, States need not "include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured." *Id.* The Constitution did not require Hawaii to apportion districts based on total population given that a large number of residents who were not part of the State's voting population, such as military personnel and seasonal tourists, "counted as part of Hawaii's census population." *Id.* at 94.

The Court did express concern, however, about using a "registered voter or actual voter basis" because it "depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote." *Id.* at 92. "Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a ghost of prior malapportionment." *Id.* at 92-93 (citation omitted). After careful study, the Court concluded that Hawaii's use of registered voters as its apportionment base satisfied "the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93.

For several reasons, then, *Burns* did not foreclose judicial review. Foremost, the passage discussing "choices about the nature of representation with which" the Court had "been shown no constitutionally founded reason to interfere" identified—but did not resolve—the issue described as "carefully left open" in *Reynolds*. *Id.* at 91-92. The Court's subsequent pronouncement that "some question" remains as to the proper "[population] basis of apportionment" is proof. *Hadley*, 397 U.S. at 57-58 n.9 (citing *Burns*, 384 U.S. at 90-95). After all, no question would remain had *Burns* held that States and localities simply may use any population base they wish "absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." J.S. App. 13a. This important issue remains open because "the Court [has] never determined the relevant 'population' that States and localities must equally distribute among their districts." *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001) (Thomas, J., dissenting from denial of certiorari).

Regardless, any suggestion in *Burns* that use of total population as an apportionment base is not subject to judicial challenge even when it fails to protect the rights of voters would have been dicta. *Burns* did not present the question because Hawaii's apportionment base—registered voters—was designed to ensure that each voter was treated equally through the districting process. *Burns* thus holds that apportionment based on total population is not required when doing so would undermine the rights of voters. But *Burns* could not have decided the issue here: whether a State may exclusively apportion districts based on total population when it *does* undermine voter equality.

If anything, *Burns* suggests that total population would not be a "permissible population base" under facts such as those here. 384 U.S. at 95. In light of the issue Hawaii confronted with military personnel and seasonal tourists, "grossly absurd and disastrous results would flow" from apportioning districts based on total population. *Id.* at 94 (citation and internal quotation marks omitted). In other words, because using total population, for Hawaii, would have "constitute[d] a substantially distorted reflection of the distribution of state citizenry, ... a finding that registered voters distribution [did] not approximate total population distribution [was] insufficient to establish constitutional deficiency." *Id.* at 94-95. Although it did not need to reach the issue, it is unlikely the Court would have approved of an apportionment base causing "absurd" and "disastrous" results.

Finally, the district court's reading of *Burns* cannot be squared with the Court's close examination of Hawaii's use of registered voters. As explained, the Court agreed that Hawaii had fairly ruled out using total population. But "state citizen population," which was shorthand for "[s]tate citizen population eligible to vote (*i.e.*, voter population)," *id.* at 84 n.12, would have been a superior legislative choice in that it would have solved Hawaii's military and seasonal tourist problems without triggering the equal-protection concerns that result from excluding eligible (but unregistered) voters from the apportionment base, *see id.* at 92-95. As noted, the Court scrutinized Hawaii's use of registered voters as the apportionment base, ultimately tolerating it only because it "approximate[d] distribution of state citizens or another permissible population base." *Id.* at 95.

Under the district court's reasoning, Hawaii's choice among total population, state citizenship, and registered voters would have been judicially unreviewable. But the Court did review Hawaii's choice of a population basis because there must be some apportionment basis "against which compliance with the Equal Protection Clause is to be measured." *Id.* at 92; *see also Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from denial of rehearing en banc) ("The one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population."). The reluctance to interfere with State and local apportionment decisions where there is no indication that the "choice is one the Constitution forbids" is appropriate. *Burns*, 384 U.S. at 92. The Court saw no need to interfere with Hawaii's choice of registered voters because it led to the same place as apportionment based on eligible voters. But that does not mean Texas's use of total population as an apportionment base is unreviewable when that legislative choice dilutes the votes of those eligible to cast a ballot. No decision of this Court—including *Burns*—relegates legal protection of Appellants' rights under the one-person, one-vote rule to the political process.

Plainly stated, adopting the district court's reading of *Burns* would mean the one-person, one-vote rule affords *no* constitutional protection to eligible voters. For example, Texas could have adopted a Senate plan containing 31 districts of equal total population without violating the one-person, one-vote rule even if 30 of the Senate districts each contained one eligible voter and the 31st district contained all other eligible voters in Texas. The idea that this hypothetical apportionment plan could withstand one-person, one-vote review is absurd. That it

would prevail under the district court's interpretation of *Burns* is reason alone to reject it.

B. The Ninth Circuit's representational equality rationale cannot be reconciled with *Burns v. Richardson* or any other decision.

Unlike the district court, the Ninth Circuit held that this one-person, one-vote claim is judicially reviewable, but rejected it on the merits under both the Equal Protection Clause and the Petition Clause of the First Amendment. The Ninth Circuit read *Reynolds* to mean that "*all* the people ... including those who are ineligible to vote, form the basis for representative government." *Garza*, 918 F.2d at 774. "Basing districts on voters rather than total population" would lead to "serious population inequalities," which in turn would give "[r]esidents of the more populous districts ... less access to their elected representative" in violation of the one-person, one-vote rule. *Id.* The Ninth Circuit further held that this same "[i]nterference with ... free access to elected representatives" would have violated these residents' right to "petition the government." *Id.* at 775. The Ninth Circuit thus *requires* States and localities within its reach to apportion voting districts based on total population.

Neither theory is tenable as a matter of precedent. As explained above, *Burns* squarely held that Hawaii was not required to apportion districts on the basis of total population. *See* 384 U.S. at 91-92 ("Indeed, in *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964), decided the same day [as *Reynolds*], we treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population

measure."); *WMCA, Inc.*, 238 F. Supp. at 921 (concluding that the Supreme Court has "approved the use of citizen population as a basis for legislative apportionment"). Quite the opposite, *Burns* suggests that there are circumstances when using total population would be inappropriate. *See supra* at 35. There can be no doubt, then, that *Burns* rejects the Ninth Circuit's conception of *Reynolds*; if the one-person, one-vote rule required use of total population, the case would have come out the other way. *See Garza*, 918 F.2d at 784 (Kozinski, J., concurring and dissenting in part). The Ninth Circuit's "equal access" theory is foreclosed whether it is framed under the Equal Protection Clause or the First Amendment.

Both Ninth Circuit theories likewise fail as a matter of constitutional principle. First off, nothing about the rule Appellants propose here would deny any resident access to his or her elected representative, and the Ninth Circuit did not suggest otherwise. The constitutional injury the Ninth Circuit held that residents of electoral districts with larger populations of non-voters would "suffer ... in a voter-based apportionment scheme" is instead "*diminishing* access to government." *Garza*, 918 F.2d at 775 (emphasis added). That is not a cognizable claim.

It certainly is not a cognizable claim under the one-person, one-vote rule. As explained at length above, "what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation." *Garza*, 918 F.2d at 782 (Kozinski, J., concurring and dissenting in part). To be certain, the Court thought transitioning from a State and local districting model based on geography to one based on population would "prevent debasement of voting power" as

well as "diminution of access to elected representatives." *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). But the latter was always understood to be the byproduct of the former—not an independently enforceable constitutional right. *Reynolds*, 377 U.S. at 565-66 ("Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, we conclude that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators.").

Put differently, none of this Court's decisions suggest (let alone hold) that a resident's diluted access to his or her representative is a "legally cognizable injury" within the meaning of the one-person, one-vote rule. *Baker*, 369 U.S. at 208. In all of these decisions, the plaintiffs established standing based on their eligibility to vote. *See supra* at 19-24. Absent that showing, there is no reason to believe that the Court would have declared a judicially enforceable one-person, one-vote right in the first place. Article III requires a "causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). In the *Baker/Reynolds* line of decisions, there was a causal connection between the vote-dilution injury and the contested method of reapportionment.

But under the Ninth Circuit's equal-access version of the one-person, one-vote rule, the residents' eligibility to vote has no relevance. Indeed, *non-voters* would have standing to bring a one-person, one-vote claim for diluted access to their elected representative. That cannot be. Whatever its precise contours, there is no doctrinal support for the notion that a non-voter could somehow

have a cognizable claim under the one-person, one-vote rule to secure a right of undiluted access at the direct expense of a voter's right to an equal vote. *See Baker*, 369 U.S. at 205-08.

The Ninth Circuit's novel First Amendment rationale fares no better. According to this theory, even if *Reynolds* protects eligible voters, the Petition Clause is a barrier to enforcing that right. In other words, that which the Equal Protection Clause requires, the First Amendment forbids. But the premise of the Ninth Circuit's collateral attack on *Reynolds* is flawed. The Petition Clause does not include a right to "equal access."

Decisions like *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961), upon which the Ninth Circuit relied, protect an individual's right to petition the government free from unreasonable restraint. *See United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965). But there is no right under the Petition Clause to equal time. A constituent is entitled to mail, call, or visit his elected representative's office. But he has no right to have that letter opened, call returned, or have his meeting request accepted—even if the representative reads the letters, answers the calls, or meets with other constituents of the district. Individuals thus certainly "have a right to petition their government for services and to influence how their tax dollars are spent." *Garza*, 918 F.2d at 775. But just as there is no interest under the Free Speech Clause "in equalizing the relative ability of individuals and groups to influence the outcome of elections," *Buckley v. Valeo*, 424 U.S. 1, 48 (1976), there is no protectable interest under the Petition Clause in equalizing the access of constituents to their elected representatives.

Accordingly, there is no support for the comparative right of undiluted access the Ninth Circuit mistakenly read into the Petition Clause. This unusual competition between the First Amendment and the Equal Protection Clause has not arisen before because representational equality is not an individual constitutional right. It may be a nonjusticiable constitutional value, *see, e.g.*, *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), or a redistricting policy such as "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives," *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). Either way, representational equality is not an interest on par with the fundamental right to an equal vote. *See Reynolds*, 377 U.S. at 555 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

This is not to disparage representational equality as an appropriate legislative concern. Voter equality must be given "controlling consideration" under the one-person, one-vote rule. *Reynolds*, 377 U.S. at 581. But States are not forbidden from making total-population equalization a legislative priority; the one-person, one-vote rule does not require a State to maximize voter equality to the exclusion of all other policy interests, such as representational equality, it might genuinely deem important. What a State may not do, as Texas did here, is elevate that policy interest above the fundamental constitutional protection the one-person, one-vote rule affords to eligible voters. *See infra* at 48.

C. The Court has consistently rejected the "so-called federal analogy."

Last, one court of appeals has suggested that making voter equality the touchstone of the one-person, one-vote rule would be inappropriate because, subject to certain exceptions, the Constitution apportions seats in the House of Representatives among the States "according to their respective numbers, counting the whole number of persons in each State." U.S. Const., amend. XIV, § 2. In the Fifth Circuit's view, "use of total population figures for purposes of allocating the federal House of Representatives among the states" undermines the case for interpreting *Reynolds*, to require the equal distribution of eligible voters. *Chen*, 206 F.3d at 527. The Fifth Circuit's reasoning is incorrect. The Constitution's formula for apportioning Congressional seats *across* States has no bearing on the requirements for creating districts *within* each State.

The Court has rejected the "so-called federal analogy." *Reynolds*. 377 U.S. at 572. In *Reynolds*, Alabama argued that its allocation of one senator to each county was "analogous to the allocation of two Senate seats, in the Federal Congress, to each of the 50 States, regardless of population." *Id.* at 571. The Court found the analogy "inapposite and irrelevant to state legislative districting schemes." *Id.* at 573. "The system of representation in the two Houses of the Federal Congress is one ... conceived out of compromise and concession indispensable to the establishment of our federal republic." *Id.* at 574. The unique conditions that produced the federal system shed no light on what the Equal Protection Clause requires of the States. In short, "the Founding Fathers clearly had no intention of establishing a pattern or model for

the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted." *Id.* at 573.

Gray rejected Georgia's similar argument in defense of its county unit system as approximating the Electoral College. *See supra* at 22. Like Alabama's comparison to the U.S. Senate, "analogies to the electoral college" were "inapposite." *Gray*, 372 U.S. at 378. "The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of an analogous system by a State in a statewide election." *Id.* (footnote omitted). Had the Framers sought to grant the States the latitude to model their systems of representation on the Electoral College, they would have. "No such specific accommodation of the latter was ever undertaken," however, "and therefore no validation of its numerical inequality ensued." *Id.*

Any reliance in the present context on the use of total population to apportion the House of Representatives fails for similar reasons. As an initial matter, the analogy is far from perfect even on its own terms. Under the Constitution, "each State shall have at Least one Representative," U.S. Const., art. I, § 2, cl. 3, even if a State would not be entitled to one under a one-person, one-vote model. The one-person, one-vote rule thus has no application to federal apportionment.

More fundamentally, neither the text nor history of Article I or Section 2 of the Fourteenth Amendment shows that the basis for apportioning Congressional seats was designed to control the outcome of the one-person,

one-vote inquiry. *See* Scot A. Reader, *One Person, One Vote Revisited: Choosing A Population Basis to Form Political Districts*, 17 Harv. J.L. & Pub. Pol'y 521, 528 (1994) ("[T]he Framers arrived at their method for the allocation of congressional representatives among the states out of concerns about federalism, not equal protection of individuals."). Indeed, "the overall context in which the amendment was drafted prevents any firm conclusion being drawn as to the framer's intent regarding the question before us." *Chen*, 206 F.3d at 527. Even if the "federal analogy" were not forbidden, then, it still would be of little assistance.

In the end, the Court cannot resolve the issue here by analogy. *Baker* and *Reynolds* are foundational rulings that must be interpreted on their own terms. What the Court must decide therefore is whether the one-person, one-vote rule recognized in those decisions protects the rights of eligible voters—to any reasonable degree. Because if it does, there is no basis upon which the district court's decision can be affirmed.

III. Plan S172 Is *Per Se* Unconstitutional Under The Settled Legal Framework For Reviewing One-Person, One-Vote Claims.

Deciding that the one-person, one-vote rule affords each eligible voter an equal vote principally resolves the question presented. As in *Reynolds*, however, the Court also needs to set forth "general considerations" that will fully protect the rights of eligible voters throughout the apportionment process and will provide the lower courts the direction needed to resolve implementation issues "on a case-by-case basis." 377 U.S. at 578. On an issue this

significant, moreover, States are entitled to guidance as the next redistricting cycle approaches.

As an initial matter, the Court should make clear that the existing legal framework for evaluating State and local compliance with the one-person, one-vote rule continues to apply. The framework is designed to ensure that the relevant population is as equal "as is practicable" given that "[m]athematical exactness" is not a "workable constitutional requirement" while affording States the "flexibility" needed "to implement legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 577-79. Nothing about this appeal requires modification of the longstanding approach to one-person, one-vote enforcement. States and localities have extensive experience with it. All this Court need do is clarify that, for the many reasons set forth above, the case law's reference to "population" in this analysis means the population of eligible voters.

This framework serves two critical functions. First, it ensures voter equality by requiring the State to make "an honest and good faith effort to construct districts ... as nearly of equal population as is practicable." *Id.* at 577. This case shows just how important that requirement is. Texas did not even attempt to equalize the number of eligible voters in each Senate district because it labored under the misapprehension that the one-person, one-vote rule *required* it to apportion districts based on total population irrespective of how much vote dilution that caused. *See supra* at 4. Therefore, Texas could not have properly exercised any discretion it holds to consider policy factors. Adhering to this basic requirement ensures that the "arbitrariness," *Roman v. Sincock*, 377 U.S. 695,

710 (1964), that infected Texas's redistricting process will not become a recurring problem.

In fact, had the Texas Legislature used the population of eligible voters as its starting point (as *Baker* and *Reynolds* require), it still could have largely reconciled total and voter population. "Using standard GIS software, one can readily adjust the boundaries of the districts in Plan S172 to create numerous alternatives to Plan S172." J.S. Supp. App. 2. As a mathematical matter, "it is possible to devise a number of feasible alternative 31-district plans with different combinations of total population and CVAP deviations," including at least one plan "that eliminate[s] the gross deviations in CVAP without significantly exceeding the 8.04% total population deviation from the ideal in Plan S172." *Id.* at 2-3. In short, there are "many feasible ways" to apportion Senate districts in order to "eliminate gross deviations in CVAP without causing significantly larger deviations in total population." *Id.* at 3. As this case shows, requiring States to make a good-faith effort to achieve voter equality will go a long way toward vindicating the animating principle of the one-person, one-vote rule without forcing them to abandon an interest in representational equality.

Second, the framework's "10% deviation" standard ensures that the appropriate party shoulders the burden of justifying or challenging the districts that States and localities have drawn. Under this model, a plan "with a maximum population deviation under 10% falls within [the] category of minor deviations," *Brown v. Thomson*, 462 U.S. 835, 842 (1983), and is therefore "considered to be of *prima facie*

constitutional validity," *Connor*, 431 U.S. at 418.[7] "A plan with larger disparities in population, however, creates a *prima facie* case of discrimination and therefore must be justified by the State." *Brown*, 462 U.S. at 842-43; *see also Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973).[8] A large enough deviation is *per se* unconstitutional. *See Mahan v. Howell*, 410 U.S. 315, 329 (1973).

---

7. With respect to congressional redistricting, in contrast, the State must "make a good-faith effort to achieve precise mathematical equality" and "[u]nless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small." *Kirkpatrick*, 394 U.S. at 530-31. The more restrictive standard was required given that, unlike the Equal Protection Clause, "Article I, § 2 ... permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Karcher*, 462 U.S. at 730 (citations and internal quotation marks omitted).

8. The courts of appeals are divided over whether strict scrutiny or some more generous standard applies to one-person, one-vote deviations exceeding 10%. *Compare, e.g., Daly*, 93 F.3d at 1218 n.8, *with, e.g., Carlson v. Wiggins*, 675 F.3d 1134, 1139 (8th Cir. 2012). The Court need not resolve that issue given that, as explained herein, Texas's deviations are *per se* unconstitutional. The questions in *Harris v. Ariz. Indep. Comm'n*, No. 14-232, also are not implicated as that appeal asks the Court, among other things, to decide the proper standard of judicial review when the population deviations are *less than* 10%. It is noteworthy, however, that the Court may not be able to reach the issues raised in *Harris* if Appellants prevail here as the deviations, once properly measured against the base of eligible voters, are not actually less than 10%. *See Harris* Jurisdictional Statement at 25-26 (noting that "when measured using citizen voting-age population the deviation was not ... 8.8%, but 54.81%").

This has always been a sensible way to approach the issue. There are a number of recognized districting policies that can justify "divergences from a strict population standard." *Reynolds*, 377 U.S. at 577. Indeed, there is no doubt that the Court has been appropriately cognizant of each State's sovereign authority to implement a variety of "legitimate objectives" beyond ensuring compliance with the one-person, one-vote rule. *Brown*, 462 U.S. at 842; *see also Abate v. Mundt*, 403 U.S. 182, 185 (1971). Accordingly, legitimate legislative priorities such as "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent[s]" can justify some variance between districts. *Karcher*, 462 U.S. at 740. As noted above, representational equality is another such interest. In some States, like Texas, representational equality might even be sufficiently important to allow voter-population deviations somewhat greater than ordinarily permissible. *Reynolds*, 377 U.S. at 578 ("What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case.").

At the same time, such policy considerations cannot be allowed to swallow the fundamental rule of equal voting power. As the Court has explained, "if, even as a result of a clearly rational state policy ... population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired." *Id.* at 581. States retain substantial flexibility (as they should) to apportion districts in a fashion best suiting their needs. *See Brown*, 462 U.S. at 848 (O'Connor, J., concurring). But such flexibility must be

exercised without negating the equal-protection rights of eligible voters. Otherwise, an interest in representational equality, "urged in justification of disparity in district population," could be leveraged to "emasculate the goal of substantial equality." *Mahan*, 410 U.S. at 326. That would conflict with the "overriding objective" of ensuring "'that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.'" *Id.* at 322 (quoting *Reynolds*, 377 U.S. at 579).

At bottom, then, there must be "some outer limit to the magnitude of the deviation that is constitutionally permissible even in the face of the strongest justifications." *Brown*, 462 U.S. at 849-50 (O'Connor, J., concurring). And the Court must make clear that the massive deviations of Plan S172 exceed that outer limit. As the Court has explained, a 16.4% deviation "may well approach tolerable limits" no matter the State's justification. *Mahan*, 410 U.S. at 329. Under Plan S172, District 1's deviation ranges from 40.08% to 49.23% under various metrics for calculating the population of eligible voters; for District 4, the deviation ranges from 30.81% to 42.22%. *See supra* at 11-12. Plan S172's deviations thus are double and triple those that the Court found troubling in *Mahan*. No state policy, however urgent, could justify this type of gross malapportionment. If the one-person, one-vote rule affords eligible voters any protection, Plan S172's deviations are *per se* unconstitutional.

* * *

"Redistricting is 'primarily the duty and responsibility of the State.'" *Perry v. Perez*, 132 S. Ct. 934, 940 (2012) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)). But in

enacting Plan S172, Texas did not fulfill its responsibility under the Equal Protection Clause to give voter equality "controlling consideration." *Reynolds*, 377 U.S. at 581. It gave *no* consideration to voter equality. That error led to gross deviations in the number of eligible voters residing in each Senate district under Plan S172, which deprived Appellants of the equally weighted vote to which they are entitled under this Court's decisions. Appellants therefore have made out a classic one-person, one-vote claim to which Texas has no viable defense.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

MEREDITH B. PARENTI
PARENTI LAW PLLC
7500 San Felipe, Suite 600
Houston, Texas 77063

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, Virginia 22201
(703) 243-9423
will@consovoymccarthy.com

Counsel for Appellants

July 31, 2015

No. 14-940

In the Supreme Court of the United States

SUE EVENWEL, ET AL.,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR APPELLEES

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@
texasattorneygeneral.gov
(512) 936-1700

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

LISA BENNETT
Assistant Solicitor General

QUESTION PRESENTED

Whether the three-judge district court correctly held that the "one-person, one-vote" principle under the Equal Protection Clause allows States to use total population, and does not require States to use voter population, when apportioning state legislative districts.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities v

Introduction 1

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 3

Summary of Argument 8

Argument 10

I. Plaintiffs' Claim Is an Equal Protection Claim of Invidious Vote Dilution. 10

A. A One-Person, One-Vote Claim Is a Claim of Invidious Vote Dilution 10

B. A State Does Not Commit Unconstitutional Vote Dilution Unless It Acts Irrationally or for an Impermissible Purpose. 16

II. A Good-Faith Effort to Equalize Total, Citizen, or Voting-Eligible Population Satisfies the Equal Protection Clause. 18

A. *Burns v. Richardson* Held that the Equal Protection Clause Does Not Require States to Reapportion Based on a Particular Measure of Population. 18

B. A State Does Not Commit Invidious Vote Dilution When It Makes a Good-Faith Effort to Equalize Total, Citizen, or Voting-Eligible Population. 24

1. Substantial population equality generally satisfies the Equal Protection Clause. 25

2. The apportionment goal of population equality is not in tension with the goal of voting equality. 34

3. *Baker* and *Reynolds* do not require the States to rely on voter population. 37

4. The text and history of the Fourteenth Amendment do not support plaintiffs' interpretation of the Equal Protection Clause. ... 39

C. States Are Not Required to Reapportion Based on Total Population. 43

III. Texas Did Not Violate the Equal Protection Clause by Apportioning Senate Seats Based on Total Population 49

A. Texas Did Not Engage in Invidious Vote Dilution. 49

B. Census Data Provide a Reliable Measure of Population. 50

C. Plaintiffs Propose Unworkable Apportionment Methods. 54

Conclusion 57

Appendix — Apportionment Base Provided by State Constitutions and Statutes 1a

TABLE OF AUTHORITIES

Page

Cases

Abrams v. Johnson,
521 U.S. 74 (1997) 32

Baker v. Carr,
369 U.S. 186 (1962) ..... *passim*

Bd. of Estimate v. Morris,
489 U.S. 688 (1989) 34, 36, 37

Brown v. Thomson,
462 U.S. 835 (1983) ..... *passim*

Burns v. Richardson,
384 U.S. 73 (1966) ..... *passim*

Carrington v. Rash,
380 U.S. 89 (1964) 20

Chapman v. Meier,
420 U.S. 1 (1975) 29

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2002) 15, 40, 41

City of Mobile v. Bolden,
446 U.S. 55 (1980) 11, 16-17

Connor v. Finch,
431 U.S. 407 (1977) 29

Daly v. Hunt,
93 F.3d 1212 (4th Cir. 1996) 15

Davis v. Mann,
377 U.S. 678 (1964) 31

Eastern R.R. President's Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 46

Gaffney v. Cummings,
412 U.S. 735 (1973) ..... *passim*

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1990) ..... *passim*

Gray v. Sanders,
372 U.S. 368 (1963) ..... *passim*

Hadley v. Junior Coll. Dist. of Metropolitan Kansas City, 397 U.S. 50 (1970) 34, 35, 36

Holt v. Richardson,
238 F. Supp. 468 (D. Hawaii 1965) 21, 22

Karcher v. Daggett,
462 U.S. 725 (1983) 27, 32, 50, 51

Kilgarlin v. Hill,
386 U.S. 120 (1967) 23, 30

Kilgarlin v. Martin,
252 F. Supp. 404 (S.D. Tex. 1966), *rev'd in part, Kilgarlin v. Hill*, 386 U.S. 120 (1967) (per curiam) 23

Kilgarlin v. Martin,
C.A. No. 63-H-390 (W.D. Tex. Jan. 11, 1965) 23

Kirkpatrick v. Preisler,
394 U.S. 526 (1969) 32, 46, 51

Larios v. Cox,
300 F. Supp. 2d 1320 (N.D. Ga.) (per curiam),
summarily aff'd, 542 U.S. 947 (2004) 33

Lucas v. Forty-Fourth General Assembly of State of Colo., 377 U.S. 713 (1964) 30

Mahan v. Howell,
410 U.S. 315 (1973) 18, 30

McGowan v. Maryland,
366 U.S. 420 (1961) 16

Md. Comm. for Fair Representation v. Tawes,
377 U.S. 656 (1964) 31

Personnel Adm'r of Mass. v. Feeney,
442 U.S. 256 (1979) 16, 17

Reno v. Bossier Parish Sch. Bd.,
520 U.S. 471 (1997) 16, 17

Reynolds v. Sims,
377 U.S. 533 (1964) ..... *passim*

Rogers v. Lodge,
458 U.S. 613 (1982) 16, 17

Roman v. Sincock,
377 U.S. 695 (1964) 30

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 26

Swann v. Adams,
385 U.S. 440 (1967) 30

Tennant v. Jefferson Cnty. Comm'n,
133 S. Ct. 3 (2012) (per curiam).....31–32

Washington v. Davis,
426 U.S. 229 (1976).....16

Wells v. Rockefeller,
394 U.S. 542 (1969).....32

Wesberry v. Sanders,
376 U.S. 1 (1964).....14–15, 32

Whitcomb v. Chavis,
403 U.S. 124 (1971).....11, 30

White v. Regester,
412 U.S. 755 (1973).....10, 29

White v. Weiser,
412 U.S. 783 (1973).....32

Wisconsin v. City of New York,
517 U.S. 1 (1996).....45

WMCA, Inc. v. Lomenzo,
377 U.S. 633 (1964).....23

Yick Wo v. Hopkins,
118 U.S. 356 (1886).....33

Constitutional Provisions, Statutes, and Rules

U.S. Const. amend. XIV, § 1 3

U.S. Const. amend. XIV, § 2 .....3, 39, 41

Tex. Const. art. III, § 2.....57

Tex. Const. art. III, § 25.....4, 23

Tex. Const. art. III, § 28 3

28 U.S.C. § 1253 2

28 U.S.C. § 2284(a) 4

Act of May 21, 2011, 82d Leg., R.S., ch. 1315, 2011 Tex. Gen. Laws 3748 4

Act of June 21, 2013, 83d Leg., 1st C.S., ch. 1, 2013 Tex. Gen. Laws 4889 4

Fed. R. Civ. P. 12(b)(6) 6, 8

Other Authorities

ACS, U.S. Census Bureau, A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know (Oct. 2008) 52

ACS, U.S. Census Bureau, Sample Size 52

M. Davis, *Assessing the Constitutionality of Adjusting Prisoner Census Data in Congressional Redistricting: Maryland's Test Case*, 43 U. Balt. L.F. 35 (2012) 28

J. Fishkin, *Weightless Votes*, 121 Yale L.J. 1888 (2012) 28

Nat'l Conf. of State Legislatures, Redistricting Law 2010 (2009) 28

Scot A. Reader,
One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts,
17 Harv. J.L. & Pub. Pol'y 521 (1994) 38

Joseph T. Sneed III,
Footprints on the Rocks of the Mountain: An Account of the Fourteenth Amendment (1997)...41

Tex. Att'y Gen. Op. No. MW-350 (1981) 23, 24

U.S. Census Bureau,
United States Census 2010 (2009) 52

In the Supreme Court of the United States

SUE EVENWEL, ET AL.,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR APPELLEES

INTRODUCTION

Texas reapportioned its state Senate districts by substantially equalizing total population, just as countless state and local governments have done for decades. As this Court explained almost 50 years ago, a State's decision to include or exclude non-voters in its apportionment base "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." *Burns v. Richardson*, 384 U.S. 73, 92 (1966). Since then, the Court has consistently relied on total population in upholding state legislative apportionments against invidious-vote-dilution claims under the Equal Protection Clause's one-person, one-vote principle. Texas's good-faith effort

here to equalize the total population of its state legislative districts likewise does not amount to invidious vote dilution under the Equal Protection Clause.

JURISDICTION

The district court entered judgment on November 5, 2014, and plaintiffs filed a timely notice of appeal on December 4, 2014. This Court has jurisdiction to review the decision of the three-judge district court under 28 U.S.C. § 1253. The political-question doctrine does not apply here under *Baker v. Carr*, 369 U.S. 186, 237 (1962).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> Section 1.
>
> > All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const. amend. XIV, §§ 1–2.

STATEMENT OF THE CASE

1. The Texas Constitution requires the Texas Legislature to reapportion its Senate districts during the first regular legislative session following the federal decennial census. Tex. Const. art. III, § 28. The Texas Constitution restricts that apportionment by requiring that "[t]he State shall be divided into Senatorial Districts of contiguous territory, and each

district shall be entitled to elect one Senator." *Id.* art. III, § 25.

Following the 2010 census the Texas Legislature passed a Senate reapportionment plan known as Plan S148. *See* Act of May 21, 2011, 82d Leg., R.S., ch. 1315, 2011 Tex. Gen. Laws 3748. Voting Rights Act litigation immediately commenced. A three-judge district court enjoined Plan S148, which had not been precleared under VRA § 5, and issued an interim plan known as Plan S172 for the 2012 primary elections. J.S. App. 4a. In 2013, the Texas Legislature repealed Plan S148 and permanently adopted Plan S172. *See* Act of June 21, 2013, 83d Leg., 1st C.S., ch. 1, 2013 Tex. Gen. Laws 4889. Plan S172 provides for Senate districts of substantially equal total population based on the 2010 census. *See, e.g.*, Supp. J.S. App. 5–12.

2. Plaintiff Sue Evenwel lives in Titus County, Texas, which is in Senate District 1 of Plan S172. J.S. App. 19a–20a. Plaintiff Edward Pfenninger lives in Montgomery County, Texas, which is in Senate District 4. J.S. App. 20a. In 2014, plaintiffs sued the Texas Governor and Secretary of State in their official capacities, asserting that Plan S172's apportionment violates the Equal Protection Clause. Because plaintiffs brought a constitutional challenge to the apportionment of a statewide legislative body, the Chief Judge of the Fifth Circuit convened a three-judge district court. *See* 28 U.S.C. § 2284(a).

Plaintiffs alleged that Plan S172 violates the "one-person, one-vote" principle of the Equal Protection Clause by apportioning Texas Senate districts based

on total population, so that each district contains a substantially equal number of individuals without accounting for "the number of electors or potential electors." J.S. App. 18a. Plaintiffs conceded that Plan S172's total deviation from perfectly equal population across districts, using total population, is 8.04%. J.S. App. 5a. They alleged, however, that the districts vary to a larger degree in voter population. J.S. App. 25a–31a. Plaintiffs sought a judgment declaring that Plan S172 violates the Equal Protection Clause, an order enjoining the State from using Plan S172 to conduct any election, and an order requiring the Texas Legislature to reapportion the State's Senate districts. J.S. App. 34a.

Although plaintiffs alleged that the State could have configured its 31 Senate districts to reduce the variation in both total population and citizen-voting-age population, they did not offer a demonstrative plan. Nor did plaintiffs allege that they (or anyone else) had provided the Legislature with a proposed Senate plan that equalized both total and voter population. Instead, plaintiffs submitted to the district court a two-page declaration from a demographer, who stated that he generated "a redistricting plan adhering to Plan S172 districting as closely as possible but minimizing total population and CVAP [citizen-voting-age population] deviations." Supp. J.S. App. 3 (Declaration of Peter A. Morrison, Ph.D.). According to the declaration, that plan "eliminated the gross deviations in CVAP without significantly exceeding the 8.04% total population

deviation from ideal in Plan S172." Supp. J.S. App. 3. The demographer concluded that "there are many feasible ways to eliminate gross deviations in CVAP without causing significantly larger deviations in total population." He offered his opinion "that the large CVAP deviations in Plan S172 districts were not a necessary consequence of population equalization and that the distribution of CVAP could be substantially equalized among all 31 districts without departing from the goal of equalizing each district's total population." Supp. J.S. App. 3. Although the declaration states that he considered data from Plan S172, it provided no data from the demographer's own plan. Like the tables in plaintiffs' brief, Br. 9, 11–12, the calculations in the declaration reflect data related to Plan S172. Regarding the demographer's plan, the declaration states only that it "minimiz[ed] total population and CVAP deviations" and "eliminated the gross deviations in CVAP"; it does not specify the extent of the deviations or allege that they fell below 10%. Supp. J.S. App. 3. The demographer explained that he "was not asked to, and did not attempt to, devise a plan that would optimally balance these two deviations." Supp. J.S. App. 2.

Defendants moved to dismiss for failure to state a claim upon which relief could be granted, Fed. R. Civ. P. 12(b)(6), arguing that the Equal Protection Clause does not compel the State to use voter population rather than total population or to use a combination of the two. J.S. App. 6a.

3. The three-judge district court granted defendants' Rule 12(b)(6) motion to dismiss. J.S. App. 4a. The court's opinion noted that "the Supreme Court has generally used total population as the metric of comparison." J.S. App. 7a–8a (citing *Brown v. Thomson*, 462 U.S. 835, 837–40 (1983); *Gaffney v. Cummings*, 412 U.S. 735, 745–50 (1973); *Reynolds v. Sims*, 377 U.S. 533, 568–69 (1964)). The district court acknowledged that plaintiffs are "relying upon a theory never before accepted by the Supreme Court or any circuit court: that the metric of apportionment employed by Texas (total population) results in an unconstitutional apportionment because it does not achieve equality as measured by Plaintiffs' chosen metric—voter population." J.S. App. 9a.

The court rejected plaintiffs' assertion that their theory "is consonant with *Burns* [*v. Richardson*, 384 U.S. 73 (1966)]." J.S. App. 10a. The district court explained that *Burns*, in considering a Hawaii apportionment plan, "stated that a state's choice of apportionment base is not restrained beyond the requirement that it not involve an unconstitutional inclusion or exclusion of a protected group." J.S. App. 10a. This "amount of flexibility is left to state legislatures" because a decision about apportionment base "*involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.*" J.S. App. 10a–11a (quoting *Burns*, 384 U.S. at 92) (emphasis added by district court). The district court therefore "conclude[d] that Plaintiffs are asking us to 'interfere'

with a choice that the Supreme Court has unambiguously left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." J.S. App. 13a.

The district court thus dismissed plaintiffs' lawsuit for failure to state a claim under Rule 12(b)(6). It did so because plaintiffs admitted that Plan S172's "total deviation from ideal, using total population, is 8.04%"—which "falls below 10%," the deviation from equal population necessary to make out a prima facie case of invidious vote dilution under the Equal Protection Clause. J.S. App. 8a (citing *Brown*, 462 U.S. at 842–43). The district court did not address any issue of subject-matter jurisdiction under the political-question doctrine. Plaintiffs appealed, J.S. App. 1a, and this Court noted probable jurisdiction, 135 S. Ct. 2349 (2015) (mem.).

SUMMARY OF ARGUMENT

While "one-person, one-vote" has become a useful shorthand to describe a malapportionment claim, the underlying theory and basis for this claim is the Equal Protection Clause's general guarantee against invidious discrimination. Plaintiffs' one-person, one-vote challenge is therefore a claim of invidious vote dilution. To establish that a State committed invidious vote dilution in a legislative apportionment, plaintiffs must prove that the State reapportioned districts in an irrational manner or for the purpose of diluting voting strength.

When a State does not substantially equalize *any* population base across districts, the Court has inferred that the State could only be purposefully attempting to dilute votes. But that inference does not follow when a State substantially equalizes some reliable measure of total, citizen, or voting-eligible population. As this Court's previous one-person, one-vote cases illustrate, when a State has equalized some measure of population, the Court has rejected a claim of invidious vote dilution. *Burns v. Richardson* thus held that the Equal Protection Clause does not require States to reapportion based on any particular measure of population. States do not commit invidious vote dilution by simply choosing to use total—or voting-eligible—population when reapportioning.

Plaintiffs concede that Texas sufficiently equalized total population. Texas therefore did not engage in invidious vote dilution and did not violate the Equal Protection Clause. To the contrary, Texas relied on federal census data for the population base, and federal census data do not include citizenship data or any other measure of the voting-eligible population. Ultimately, plaintiffs propose an unworkable standard for reapportionment that would mire the Judiciary in further redistricting disputes, while subjecting States to charges of invidious vote dilution where they have made genuine, good-faith efforts to equalize population and provide fair representation.

ARGUMENT

I. PLAINTIFFS' CLAIM IS AN EQUAL PROTECTION CLAIM OF INVIDIOUS VOTE DILUTION.

Plaintiffs challenge the Texas Senate reapportionment under the one-person, one-vote doctrine. As the Court's one-person, one-vote cases clarify, this challenge is a claim of invidious vote dilution under the Equal Protection Clause. And a claim of invidious vote dilution requires plaintiffs to show either that the reapportionment was irrational or made with the purpose of diluting votes.

A. A One-Person, One-Vote Claim Is a Claim of Invidious Vote Dilution.

A "one-person, one-vote" challenge to state legislative reapportionment is a claim of invidious discrimination under the Equal Protection Clause. *See, e.g.*, *Brown v. Thompson*, 462 U.S. 835, 842 (1983) ("invidious discrimination under the Fourteenth Amendment"); *White v. Regester*, 412 U.S. 755, 764 (1973) ("invidious discrimination under the Equal Protection Clause"); *Gaffney v. Cummings*, 412 U.S. 735, 736 (1973) (same); *Reynolds v. Sims*, 377 U.S. 533, 561 (1964) ("invidious discrimination violative of rights asserted under the Equal Protection Clause").

Specifically, it is a claim of invidious vote dilution. *See, e.g.*, *Brown*, 462 U.S. at 846 ("alleged dilution of their voting power"); *Gaffney*, 412 U.S. at 746 (rejecting claim "that any person's vote is being substantially diluted"); *Reynolds*, 377 U.S. at 566

(claim of "[d]iluting the weight of votes because of place of residence").

The basis for a one-person, one-vote claim has been clear since the Court first applied the doctrine to a state legislative apportionment in *Reynolds v. Sims*. As *Reynolds* explained, "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discrimination based upon factors such as race, or economic status." *Reynolds*, 377 U.S. at 568 (citation omitted); *contra Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) ("[T]he relationship between population and legislative representation [is] a wholly different matter from denial of the franchise to individuals because of race, color, religion or sex.").

Subsequent vote-dilution cases reflect the same principle: a claim of unconstitutional vote dilution requires a showing of invidious discrimination. *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124, 155 (1971) ("[I]t would not follow that the Fourteenth Amendment had been violated unless it is invidiously discriminatory . . . ."); *City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980) (plurality op.) ("We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities.").

This understanding of a one-person, one-vote claim also appears in the Court's initial application of

the one-person, one-vote principle. The Court first used the phrase "one-person, one-vote" to invalidate a vote-tabulation system that assigned votes unequal weight according to the county in which they were cast. The Court soon expanded the concept to reach facially neutral apportionment plans creating the functional equivalent of weighted votes. The label "one-person, one-vote" thus evolved into a shorthand for claims of invidious vote dilution under the Equal Protection Clause by malapportionment.

The Court first used the phrase "one person, one vote" in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), in deciding a challenge to Georgia's county-unit system, which facially discriminated against voters in certain counties by counting their votes at less than full value in statewide primary elections. *Gray* was not an apportionment case, and it did not concern the composition of state legislatures. Rather, Georgia's county-unit system mimicked the Electoral College by assigning a certain number of unit votes to each county and awarding all of the county's unit votes to the winner of the county's popular vote. This system purported "to achieve a reasonable balance as between urban and rural electoral power." *Id.* at 370. In practice, however, the unequal allocation of unit votes created a substantial imbalance in favor of rural counties to the clear detriment of urban residents.[1]

---

[1] Georgia had a population of 3,943,116 under the 1960 census. *Gray*, 372 U.S. at 371. Under the law that applied at the time the suit was filed, Fulton County, with a population of 556,326, accounted for 14.11% of the State's population but received only

The allocation of unit votes subverted majority rule; it gave "a clear majority of county units" to counties with one-third of the total state population. *Id.* at 373.

Because the county-unit system deliberately favored certain rural counties, *Gray* presented a case of unequal treatment—some votes actually counted more than others. As the Court explained:

> Georgia gives every qualified voter one vote in a statewide election; but in counting those votes she employs the county unit system which in end result weights the rural vote more heavily than the urban vote and weights some small rural counties heavier than other larger rural counties.

Id. at 379. The Court thus held that the Equal Protection Clause forbids States to give "twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area." *Id.*

To prevent overt discrimination against urban residents, *Gray* established a rule of equal treatment:

---

6 unit votes, which accounted for only 1.46% of the 410 total unit votes. *Id.* Echols County, whose census population of 1,876 accounted for only 0.05% of the statewide total, received 1 unit vote, which accounted for 0.48% of the statewide total. *Id.* As a result, "[o]ne unit vote in Echols County represented 938 residents, whereas one unit vote in Fulton County represented 92,721 residents," and "one resident in Echols County had an influence in the nomination of candidates equivalent to 99 residents of Fulton County." *Id.*

"Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Id.* In short, vote-weighting is prohibited: "Every voter's vote is entitled to be counted once." *Id.* at 380.

The one-person, one-vote doctrine soon expanded beyond *Gray* from vote-weighting systems to malapportioned state legislative districts that created the functional equivalent of weighted votes—through representation in legislatures premised on wide variations in district populations. These malapportionment claims did not allege that States were weighting votes in determining which candidate would win the election. Instead, they alleged that there were wide disparities in the number of people each duly elected candidate represented, which amounted to the functional equivalent of vote-weighting because an individual's vote could have different proportional strength depending on the number of other voters in a district.[2] *See, e.g.*, *Reynolds*, 377 U.S. at 568.

---

[2] The Court recognized a similar claim against malapportioned congressional districts, but it relied on the distinct provision for the U.S. House of Representatives in Article I, § 2, that "Representatives shall be chosen 'by the People of the several States' and shall be 'apportioned among the several States . . . according to their respective Numbers.'" *Wesberry v. Sanders*,

The Court initially held that claims against state apportionments were justiciable on the ground that "[j]udicial standards under the Equal Protection Clause are well developed and familiar," so courts could determine "that a discrimination reflects no policy, but simply arbitrary and capricious action."[3] *Baker*, 369 U.S. at 226. In the Court's first decision on the merits of a state apportionment claim, *Reynolds* remarked that the Alabama legislative districts at issue "presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone." 377 U.S. at 568. *Reynolds*

---

376 U.S. 1, 17 (1964). It explained that population-based apportionment of a State's congressional districts is necessary to ensure "that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's," *id.* at 7–8, and to follow "our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives," *id.* at 18.

[3] Because the Court determined in *Baker v. Carr* that vote-dilution challenges to apportionment plans are justiciable, the political-question doctrine does not divest the Court of jurisdiction to adjudicate plaintiffs' claim. 369 U.S. at 237. But the Court should reject plaintiffs' claim on the merits because the Equal Protection Clause does not compel States to use a particular population base when reapportioning; the Constitution therefore leaves with the States the ability to determine which population base should be equalized. *See, e.g.*, *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000) ("this eminently political question has been left to the political process"); *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996) ("This is quintessentially a decision that should be made by the state, not the federal courts, in the inherently political and legislative process of apportionment.").

went on to hold that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.*

Gray and *Reynolds* thus applied equal-protection principles to a particular set of claims. The phrase "one-person, one-vote" serves as a convenient shorthand for those claims. But it should not obscure the reality recognized throughout the Court's one-person, one-vote cases that such a challenge to state legislative reapportionment is a claim of invidious vote dilution under the Equal Protection Clause.

B. A State Does Not Commit Unconstitutional Vote Dilution Unless It Acts Irrationally or for an Impermissible Purpose.

Because a one-person, one-vote challenge to a state legislative apportionment alleges invidious vote dilution, it is "subject to the standard of proof generally applicable to Equal Protection Clause cases." *Rogers v. Lodge*, 458 U.S. 613, 617 (1982). The Equal Protection Clause does not forbid state action that merely affects some individuals differently than others. *E.g.*, *McGowan v. Maryland*, 366 U.S. 420, 425 (1961); *see also Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979) ("[T]he Fourteenth Amendment guarantees equal laws, not equal results."). A claim of mere disparate impact does not violate the Equal Protection Clause. *Washington v. Davis*, 426 U.S. 229, 240 (1976); *see also Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997) (citing *Bolden*, 446 U.S. at

62). Unless the challenged state action is arbitrary or irrational, liability requires a showing of discriminatory purpose—that is, proof "that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279 (footnote omitted).

Consistent with general equal-protection principles, this Court has held that absent arbitrary or irrational state action, a State does not commit invidious vote dilution unless it intentionally discriminates against an identifiable group of voters. *Bossier*, 520 U.S. at 481 (citing *Bolden*, 446 U.S. at 62); *Rogers*, 458 U.S. at 618–19. Plaintiffs' obligation to prove discriminatory purpose "is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteenth Amendment." *Rogers*, 458 U.S. at 619 (quoting *Bolden*, 446 U.S. at 66). To prevail on a claim of invidious vote dilution under the Equal Protection Clause, a plaintiff must prove that the challenged state law is an irrational or arbitrary exercise of the State's power, or that the challenged state law reflects a deliberate effort to dilute votes.

In accordance with this standard, the Court's one-person, one-vote decisions have found violations of the Equal Protection Clause where state apportionments did not sufficiently equalize *any* population base. *See infra* Part II.B. And when a State does not substantially equalize any population base, the Court

has essentially inferred that the State could only be purposefully attempting to dilute votes by subordinating population principles to other factors. *See id.*

II. A GOOD-FAITH EFFORT TO EQUALIZE TOTAL, CITIZEN, OR VOTING-ELIGIBLE POPULATION SATISFIES THE EQUAL PROTECTION CLAUSE.

The Equal Protection Clause is satisfied when a State "make[s] an honest and good faith effort" to equalize population among legislative districts. *Mahan v. Howell*, 410 U.S. 315, 324-25 (1973) (quoting *Reynolds*, 377 U.S. at 577). This Court therefore held in *Burns* that the Equal Protection Clause does not compel a State to choose a particular population base when reapportioning. Thus, a State does not engage in invidious vote dilution when it substantially equalizes a reliable measure of total, citizen, or voting-eligible population. States are therefore permitted to use total population when they reapportion, and they are also entitled to choose citizen or voting-eligible population. This choice does not violate the Equal Protection Clause.

A. *Burns v. Richardson* Held that the Equal Protection Clause Does Not Require States to Reapportion Based on a Particular Measure of Population.

Burns v. Richardson, 384 U.S. 73 (1966), refutes plaintiffs' argument that the Equal Protection Clause requires States to apportion legislative seats based on

some measure of voter population. The Court held in *Burns*:

> [T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in [*Reynolds*] and most of the others decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population. . . . Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. *The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.* Unless a choice is one the Constitution forbids, the resulting

> apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds v. Sims* is to be measured thereby.

384 U.S. at 91–92 (internal citation and footnotes omitted; emphasis added).[4]

The decision to include voting-ineligible populations in the apportionment base is therefore a choice "about the nature of representation" that the Equal Protection Clause leaves to the States. *Id.* And unless a State's decision to include or exclude a certain population is arbitrary, irrational, or invidious, compliance with the one-person, one-vote principle will be measured against the State's chosen apportionment base. *Id.*

In rejecting the view that the Equal Protection Clause restricts the States to a single apportionment

---

[4] As an example of a choice that the Constitution forbids, the Court cited *Carrington v. Rash*, 380 U.S. 89 (1965), which considered a provision of the Texas Constitution barring members of the armed forces who moved to Texas during the course of their military duty from becoming residents for voting purposes as long as their service continued, *see id.* at 89, 91–92. The Court held that although the State was entitled to enforce residency requirements, its rule "forbidding a soldier ever to controvert the presumption of non-residence impose[d] an invidious discrimination in violation of the Fourteenth Amendment." *Id.* at 96. Discussing the case in *Burns*, the Court explained, "The difference between exclusion of all military and military-related personnel, and exclusion of those not meeting a State's residence requirements is a difference between an arbitrary and a constitutionally permissible classification." 384 U.S. at 92 n.21.

base, *Burns* identified at least two generally permissible options: total population and citizen population. The Court recognized that Hawaii faced "special population problems," namely a substantial number of tourists and military personnel concentrated in certain parts of Oahu, which "might well have led it to conclude that state citizen population rather than total population should be the basis for comparison." *Id.* at 94. But *Burns* did not imply, let alone hold, that the Constitution forbids apportionment based on total population.[5] It held only that because of Hawaii's unique circumstances, "a finding that registered voters distribution does not approximate total population distribution is insufficient to establish constitutional deficiency," *id.* at 94–95; Hawaii could meet constitutional standards if "the distribution of registered voters approximates distribution of state citizens or another permissible population base," *id.* at 95.

The Court upheld Hawaii's use of registered voters because the resulting apportionment "substantially approximated that which would have appeared had state citizen population been the guide."

---

[5] Plaintiffs suggest that the Court believed a total-population-based apportionment would have produced "grossly absurd and disastrous results." *See* Br. 35. As the opinion indicates, however, the quoted statement came from the district court's opinion. *See Burns*, 384 U.S. at 94 (quoting *Holt v. Richardson*, 238 F. Supp. 468, 474 (D. Hawaii 1965)).

Id. at 96.[6] In other words, voter-registration population was permissible in that particular context because Hawaii's voter-registration population approximated the state citizen population—not, as plaintiffs assert, "because it led to the same place as apportionment based on eligible voters." Br. 36. The Court's reference to "state citizens or another permissible population base" makes clear that state citizenship is one of multiple permissible population bases. 384 U.S. at 95.

Burns stopped short of endorsing the use of registered voters or actual voters as a generally permissible apportionment base. It explained that either apportionment base "presents an additional problem" because neither is a strictly population-based measure; each also depends "upon the extent of political activity of those eligible to register and vote." *Id.* at 92. The Court concluded that Hawaii's use of registered voters satisfied the Equal Protection Clause only because "on this record it . . . produced a

---

[6] Plaintiffs state, incorrectly, that *Burns* used "state citizen population" as a "shorthand for '[s]tate citizen population eligible to vote (*i.e.*, voter population).'" Br. 35 (citing 384 U.S. at 84 n.12). The Court distinguished overall citizen population from voting-eligible citizen population. The cited footnote quoted the district court's list of population measures that the Hawaii Legislature might consider at a constitutional convention. That list included "total population," "citizen population," and "State citizen population eligible to vote (*i.e.*, voter population)." *Burns*, 384 U.S. at 84 n.12 (quoting 238 F. Supp. at 478). Neither the district court nor this Court conflated state citizen population and voting-eligible population.

distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93.

The Court's endorsement of citizen-based apportionment in *Burns* casts no doubt on the validity of total population as a permissible apportionment base. *See id.* at 91–92. The Court even stated that it had "treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure." *Id.* (citing *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964)). This implies that total population, like state citizenship, is a constitutionally permissible apportionment base, although neither is constitutionally required.[7]

---

[7] Plaintiffs note that the Texas Constitution previously provided for the apportionment of Senate districts "according to the number of qualified electors," Br. 4 (quoting Tex. Const. art. III, § 25 (2000)), and that the Texas Attorney General opined, in a non-binding 1981 opinion, that this provision was facially unconstitutional, *id.* The Attorney General's opinion rested solely on an unpublished summary judgment order, which found the provision unconstitutional under *Reynolds* because it did not require Senate districts "as nearly of equal population as is practicable." *See* Tex. Att'y Gen. Op. No. MW-350 at 2 (1981) (citing *Kilgarlin v. Martin*, C.A. No. 63-H-390 (W.D. Tex. Jan. 11, 1965)); *see also Kilgarlin v. Martin*, 252 F. Supp. 404, 411 (S.D. Tex. 1966) (describing summary judgment ruling), *rev'd in part*, *Kilgarlin v. Hill*, 386 U.S. 120 (1967) (per curiam) (considering claims against the apportionment of Texas House seats). Although the summary judgment order was issued before *Burns* upheld Hawaii's apportionment based on registered voters, and even though the Attorney General's opinion cited *Burns* in its

B. A State Does Not Commit Invidious Vote Dilution When It Makes a Good-Faith Effort to Equalize Total, Citizen, or Voting-Eligible Population.

When a State uses some reliable measure of total, citizen, or voting-eligible population to apportion state legislative seats, that fact generally suffices to ensure that the State has not engaged in invidious vote dilution. The Court's one-person, one-vote cases have found violations of that principle when States failed to sufficiently equalize *any* population base. In those cases, the Court has inferred invidious discrimination. But when a State equalizes some reliable measure of population, it is much more difficult to infer an invidious intent to dilute voting strength. Indeed, *Reynolds* described the inquiry as whether a State was subordinating general population principles for other concerns: if "population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired." 377 U.S. at 581.

---

background discussion of federal law, *see* Tex Att'y Gen Op. No. MW-350 at 1, the opinion did not mention *Burns* in its analysis of the constitutional provision for Senate apportionment based on qualified electors, *see id.* at 2.

1. Substantial population equality generally satisfies the Equal Protection Clause.

The Court recognized in *Reynolds* that "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." *Id.* at 577. When the record demonstrates a maximum deviation among districts of less than 10%, the Court has generally been "quite sure that a prima facie case of invidious discrimination under the Fourteenth Amendment was not made out." *Gaffney*, 412 U.S. at 751. But a state legislative plan with a deviation greater than 10% "creates a prima facie case of discrimination and therefore must be justified by the State." *Brown*, 462 U.S. at 843. Total-population equality therefore is not merely a means to the end of voter-population equality; it serves as a constitutionally sufficient indicator that a State has complied with the Equal Protection Clause by apportioning its legislature "on a population basis." *Reynolds*, 377 U.S. at 568. Only when the deviation exceeds 10% does numerical disparity permit an inference that the State has "submerge[d] the equal-population principle." *Id.* at 576.

The Court's adoption of a 10% deviation threshold for state legislative apportionments reflects the fundamental nature of the right to vote. *E.g.*, *id.* at 561–62. And the consistent application of that standard confirms that equalization of total

population among districts generally satisfies the Equal Protection Clause.

Plaintiffs say that the Court's one-person, one-vote decisions merely assumed congruence between total population and voter population. *See* Br. 27. But the Court has consistently distinguished between residents, citizens, and voters. *E.g.*, *Burns*, 384 U.S. at 94–95; *Reynolds*, 377 U.S. at 577. It has recognized that total population does not track voter population precisely, and it has repeatedly upheld state legislative apportionments that substantially equalized total population.

The Court alluded to the disparity between total and voter population in *Burns* when it raised doubts about apportionment based on registered or actual voters. According to the Court, voter-based apportionment would be "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process." 384 U.S. at 92. And the Court knew that the gap might be especially wide in States where levels of black voter registration lagged far behind white voter registration. *See, e.g.*, *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) (noting that white registration levels ran "roughly 50 percentage points or more ahead" of black registration levels in Alabama, Louisiana, and Mississippi).

In *Gaffney v. Cummings*, the Court upheld a state legislative reapportionment based on total population,

while cataloging the potential disparities resulting from apportionment based on census population:

> [I]f it is the weight of a person's vote that matters, total population—even if stable and accurately taken—may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because "census persons" are not voters. The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States. The six congressional districts in Connecticut, for example, vary from one another by as much as 4% in their age-eligible voters . . . . Other States have congressional districts that vary from one another by as much as 29% and as little as 1% with respect to their age-eligible voters. And these figures tell us nothing of the other ineligibles making up the substantially equal census populations among election districts: aliens, nonresident military personnel, nonresident students, for example.

412 U.S. at 746–47 (footnotes omitted); *cf. Karcher v. Daggett*, 462 U.S. 725, 772 n.8 (1983) (noting that because of factors including "the failure of many registered voters to cast ballots, the weight of a citizen's vote in one district is inevitably different from that in others"). *Gaffney* nevertheless stated that, where the deviation in total population was

about 8%, "we are quite sure that a prima facie case of invidious discrimination under the Fourteenth Amendment was not made out." 412 U.S. at 751.

The Court has had many occasions to require an alternative apportionment base besides total population. After all, States typically apportion their legislative seats based on total population. *See, e.g.*, J. Fishkin, *Weightless Votes*, 121 Yale L.J. 1888, 1890 (2012) ("Today, line-drawers across the nation rely almost uniformly on total population . . . ."); M. Davis, *Assessing the Constitutionality of Adjusting Prisoner Census Data in Congressional Redistricting: Maryland's Test Case*, 43 U. Balt. L.F. 35, 41 (2012) ("most jurisdictions use total population as the base" (citing Nat'l Conf. of State Legislatures, Redistricting Law 2010 at 11 (2009))).[8]

But despite its awareness that total population may not track the citizen or voting-eligible population, the Court has consistently looked to total population as a measure of equal apportionment of state legislative districts:

---

[8] As the appendix to this brief demonstrates, a clear majority of States rely on total population in apportioning state legislative districts. Only a small minority of States—California, Delaware, Hawaii, Kansas, Maine, Maryland, Nebraska, New Hampshire, New York, and Washington—have constitutional or statutory provisions that exclude particular groups from the apportionment base. These provisions variously authorize the exclusion of aliens, nonpermanent residents, nonresident military personnel, and inmates who were not state residents prior to incarceration.

- *Brown v. Thomson*, 462 U.S. 835, 837–41 (1983) (upholding apportionment of one representative to a county of 2,924 persons where "ideal apportionment" based on 1980 census would be 7,337 persons per representative);
- *Connor v. Finch*, 431 U.S. 407, 416–17 (1977) (disapproving court-ordered state legislative plans with maximum deviations of 16.5% and 19.3% from "absolute population equality," calculated by dividing state population by number of districts);
- *Chapman v. Meier*, 420 U.S. 1, 26–27 (1975) (holding that court-ordered state legislative reapportionment with total deviation of 20.14% based on 1970 census did not "achieve the goal of population equality with little more than de minimis variation");
- *White v. Regester*, 412 U.S. 755, 764 (1973) (holding that total deviation of 9.9% from equal population in state legislative plan did not meet "the threshold requirement of proving a prima facie case of invidious discrimination under the Equal Protection Clause");
- *Gaffney v. Cummings*, 412 U.S. 735, 745–50 (1973) (upholding state legislative plan with maximum deviation from "perfect census-population equality" of 7.83% in state house and 1.81% in state senate);

- *Mahan v. Howell*, 410 U.S. 315, 322 (1973) (upholding state legislative plan with total deviation of 16.4%);
- *Whitcomb v. Chavis*, 403 U.S. 124, 161–62 (1971) (holding that state legislative apportionment with total deviation from census population of 28.20% in senate and 24.78% in house did not comply with Equal Protection Clause);
- *Kilgarlin v. Hill*, 386 U.S. 120, 122–26 (1967) (disapproving state legislative apportionment plan with total deviation of 26.48%);
- *Swann v. Adams*, 385 U.S. 440, 442–45 (1967) (disapproving state legislative apportionment with total deviation of 26.65% in Senate districts and 33.55% in House districts);
- *Lucas v. Forty-Fourth General Assembly of State of Colo.*, 377 U.S. 713, 728–35 (1964) (finding legislative apportionment method in which counties containing 33.2% of State's total population elected a majority of the Senate "clearly involves departures from population-based representation too extreme to be constitutionally permissible");
- *Roman v. Sincock*, 377 U.S. 695, 708–10 (1964) (holding that state legislature was not apportioned substantially on a population basis where it would result in "two-thirds of the Senate being elected from districts where only about 31% of the State's population

reside . . . [and] 21% of the State's population would be represented by a majority of the members of the Delaware Senate");

- *Davis v. Mann*, 377 U.S. 678, 688–92 (1964) (holding state legislative apportionment invalid where 40.5% of State's population lived in districts electing majority of House members and 41.1% of State's total population lived in districts electing majority of Senate);
- *Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 664–65 (1964) (holding that state legislative apportionment with maximum population-variance ratio of 32-to-1 for senate and 12-to-1 for house was not sufficiently based on population);
- *Reynolds v. Sims*, 377 U.S. 533, 545–50, 568–69 (1964) (holding that state legislative apportionment with population-variance ratios of up to 41-to-1 in the senate and 16-to-1 in the house in existing plan, and up to 59-to-1 in the senate and 4.7-to-1 in the house under amended plan involved "deviations from a strict population basis [that] are too egregious to permit us to find that that body. . . was apportioned sufficiently on a population basis).[9]

---

[9] The Court has similarly relied on total-population data to determine the constitutionality of state congressional apportionment plans under the stricter standard of Article I, § 2. *See, e.g.*, *Tennant v. Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 8

Plaintiffs are therefore wrong to suggest that the Court neglected the question of what population the States must equalize because of "the lack of any need for further refinement." Br. 27. If plaintiffs were right about *Baker* and *Reynolds*—that is, if the Equal Protection Clause required the Court to ensure that state legislative districts contained equal voting populations—the Court could not have assumed that voter population tracked total population in those cases. It would have had no choice but to require proof

---

(2012) (per curiam) (holding that a total-population deviation of 0.79% "results in no more (or less) vote dilution today than in 1983, when this Court said that such a minor harm could be justified by legitimate state objectives"); *Abrams v. Johnson*, 521 U.S. 74, 98–99 (1997) (upholding district court plan that had overall population deviation of 0.35%, and average deviation of 0.11%, noting that "[i]f population allocation in Georgia were perfect, each district would have 588,928 people, according to 1990 census data"); *Karcher v. Daggett*, 462 U.S. 725, 728, 738 (1983) (holding that small deviations from "ideal" figure of "average population per district (as determined by 1980 census)" could have been "avoided or significantly reduced with a good-faith effort to achieve population equality"); *White v. Weiser*, 412 U.S. 783, 784–85 (1973) (disapproving congressional plan with total deviation of 4.13%, based on Census population); *Wells v. Rockefeller*, 394 U.S. 542, 545–47 (1969) (disapproving congressional plan with total deviation of 13.1%); *Kirkpatrick v. Preisler*, 394 U.S. 526, 528–32 (1969) (disapproving congressional plan with total deviation of 5.97% from "absolute population equality" based on the 1960 Census); *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964) (applying one-person, one-vote doctrine to invalidate apportionment of congressional districts in which one congressman represented two to three times as many people as were represented by congressmen from other Georgia districts violated equal protection).

that the total population approximated the voter population. Yet the Court has made no such assumption. And neither has it required proof of equal voter population.

It does not follow, however, that a State is categorically immune from equal-protection claims as long as it equalizes total population across districts. For example, if there were evidence that a State chose to apportion its legislative seats based on total population for the *specific purpose* of favoring or disfavoring a particular group of voters, a member of the disfavored group could bring a plausible claim of invidious vote dilution. *See, e.g.*, *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (per curiam), *summarily aff'd*, 542 U.S. 947 (2004). A voter would also have a vote-dilution claim if a State enacted a plan that created thirty districts containing only one eligible voter while placing all other eligible voters in the remaining district. *Cf.* Br. 36. Plaintiffs allege no such absurd result here. Even if it were possible to create such an apportionment plan, that plan would so obviously disadvantage an identifiable group of voters that it would fail the basic test of rationality. *Reynolds*, 377 U.S. at 568. And in the extreme case that plaintiffs imagine, the State's action could not be explained as anything but a deliberate attempt to injure the disfavored group. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886). But when a State makes a good-faith effort to create legislative districts of substantially equal population, as Texas

did here, there is no basis to infer invidious discrimination.

2. The apportionment goal of population equality is not in tension with the goal of voting equality.

This Court's continued reliance on total population to judge the constitutionality of state legislative apportionments creates no conflict with statements to the effect that "the relevant inquiry is whether 'the vote of any citizen is approximately equal in weight to that of any other citizen.'" *Bd. of Estimate v. Morris*, 489 U.S. 688, 701 (1989) (quoting *Reynolds*, 377 U.S. at 579), *cited in* Br. 27; *cf. Hadley v. Junior Coll. Dist. of Metropolitan Kansas City*, 397 U.S. 50, 56 (1970) ("[E]ach district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."); Br. 26–28. Considered in context, these statements just reaffirm the principle that States cannot subordinate population equality to other concerns when apportioning. So if a State creates districts of substantially equal population, it has generally satisfied the Equal Protection Clause and cannot be charged with invidious vote dilution.

This Court's decision in *Hadley* does not support plaintiffs' argument because the Court made no effort to ensure that the districts under scrutiny there contained an equal number of voters. The apportionment plan in *Hadley* was not based on voters

but on "'school enumeration,' defined as the number of persons between the ages of six and 20 years, who reside in each district." 397 U.S. at 51. State law permitted school districts to form consolidated junior college districts, governed by six trustees, and it provided generally for at-large elections. If any school district contained one-third to one-half of the total enumeration, it would elect two trustees; if any district contained one-half to two-thirds, it would elect three trustees; and if any district contained more than two-thirds, it would elect four trustees. *Id.* at 56–57. Trustees of the Kansas City School District claimed that their votes were unconstitutionally diluted because the district contained roughly 60% of the school enumeration but elected only three of the six trustees. *Id.* at 51–52.

The Court first rejected the argument that trustee elections were not subject to the one-person, one-vote principle. *Id.* at 56 (holding that trustees' exercise of "a vital governmental function" made them "governmental officials in every relevant sense of that term"). The Court then held that the apportionment plan violated the Equal Protection Clause, but not because it failed to use voter population. Rather, the Court found "built-in discrimination" because the number of trustees apportioned to large school districts always corresponded to the bottom of the relevant population range. As a result, voters in large districts would "frequently have less effective voting power than residents of small districts," but the formula prevented them from having more. *Id.* at 57

The Court cautioned that the question would be different "if the deviation from equal apportionment . . . resulted from a plan that did not contain a built-in bias in favor of small districts, but rather from the inherent mathematical complications in equally apportioning a small number of trustees among a limited number of component districts." *Id.* at 58. And the Court declined to decide "whether school enumeration figures, rather than actual population figures, can be used as a basis of apportionment." *Id.* at 57 n.9 (citing *Burns*, 384 U.S. at 90–95). It did so because "even if school enumeration is a permissible basis, [it] fails to apportion trustees constitutionally." *Id.* Thus, the Court contrasted school enumeration figures with "actual population figures," and it never specified voter population. *Id.* Despite a genuine question whether the government's chosen apportionment base was permissible, the Court relied on that base in judging the vote-dilution claim.

Similarly, the Court's decision in *Board of Estimate v. Morris* relied exclusively on total population figures to determine whether the City of New York satisfied its obligation to ensure substantially equal voting power among districts. The City's Board of Estimate comprised eight members: three officials elected citywide, each of whom cast two votes, and the presidents of the City's five boroughs, each of whom cast one vote. 489 U.S. at 694. As in *Hadley*, the initial question was whether the one-person, one-vote principle applied. The Court ruled that it did. *Id.* at 694–96. The Court then held that the

City's apportionment violated the Equal Protection Clause because of a disparity in the total population of the boroughs. *Id.* at 700 n.7 (explaining calculation of the ideal population, and the percentage of deviation, based on the parties' stipulation "that the city's total population is 7,071,030"). It agreed with the district court's conclusion that "the disparate borough populations produced a total deviation of 132.9% from voter equality among these electorates," *id.* at 691, ultimately concluding that the City could not justify "such a substantial departure from the one-person, one-vote ideal," *id.* at 703. Just like many other one-person, one-vote cases, starting with *Reynolds*, the Court relied only on total-population data.

3. *Baker* and *Reynolds* do not require the States to rely on voter population.

Plaintiffs cannot avoid this Court's consistent examination of total population in applying the Equal Protection Clause by focusing exclusively on *Baker* and *Reynolds*. *See* Br. 44 ("*Baker* and *Reynolds* are foundational rulings that must be interpreted on their own terms."). *Baker* did not even address the merits of a one-person, one-vote claim.[10] And in any event, this

---

[10] *Baker v. Carr* held that a challenge to malapportioned state legislative districts presented a justiciable claim under the Equal Protection Clause. 369 U.S. at 237. But because the district court had dismissed the complaint for lack of subject-matter jurisdiction and failure to state a claim, the Court remanded without addressing the merits. *Id.* at 188, 237.

argument fails on its own terms. If the question is whether *Baker* and *Reynolds* compel the States to use some measure of voter population for apportionment, the Court has already answered it in the negative. Just a few years after those decisions, *Burns* held that a State's decision to include non-voters in the apportionment base "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." 384 U.S. at 92.

Before *Burns*, *Reynolds* had ruled that "both houses of a bicameral state legislature must be apportioned on a population basis." *Reynolds*, 377 U.S. at 568. *Burns* then held that the one-person, one-vote principle set forth in *Reynolds* did not require the States to use any particular population base for state legislative apportionment. As *Burns* explained, *Reynolds* "carefully left open the question what population was being referred to," as the Court "discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population." 384 U.S. at 91; *see also* Scot A. Reader, *One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts*, 17 Harv. J.L. & Pub. Pol'y 521, 523 (1994) (noting that "*Reynolds* failed to distinguish between plans that place an equal number of people, citizens, or voters in all districts, and cases in the *Reynolds* progeny have never suggested that total population-based districting plans may be

constitutionally infirm") (footnote omitted). Considered in the light of *Burns*, as it must be, *Reynolds* cannot be read to impose plaintiffs' preferred apportionment base as a constitutional imperative. *Cf.* Br. 26.

4. The text and history of the Fourteenth Amendment do not support plaintiffs' interpretation of the Equal Protection Clause.

Even if *Burns* had not already rejected plaintiffs' reading of *Baker* and *Reynolds*, their argument would fail under the text of the Fourteenth Amendment, which does not provide a specific standard for state legislative apportionment. This is telling because Section 2 of the Fourteenth Amendment refers exclusively to the allotment of *congressional* seats *among* the States, based on "the whole number of persons in each State." U.S. Const. amend. XIV, § 2. This text indicates that the framers of the Fourteenth Amendment accepted total-population equality as a permissible method of apportionment.

The Fourteenth Amendment's text does not indicate that the framers intended to provide a specific rule for state legislative apportionment. Plaintiffs nevertheless argue that the general language of the Equal Protection Clause prohibits the States from employing the total-population measure, even though that measure is expressly provided in Section 2 of the Fourteenth Amendment for determining the number of Members of Congress allocated to each State. Br. 26. And plaintiffs say the

Equal Protection Clause compels the States to employ a specific alternative measure, ensuring an equal number of voters in each district. *Id.* Plaintiffs do not explain how or why the framers would forbid total-population-based apportionment with the general phrase "equal protection" in Section 1 of the Fourteenth Amendment, only to expressly endorse allocation of representatives based on total population in Section 2.

Historical circumstances also confirm that the framers of the Fourteenth Amendment did not intend to require voter population to be used for state legislative districts. The Fifth Circuit analyzed that history in *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), and concluded that the "proponents of the Fourteenth Amendment had a meaningful debate on the question" of which population measure should be used in apportionment, but that the debate "cannot be said to have been definitively resolved," *id.* at 527.

Two historical facts recounted in *Chen* cast doubt on the notion that the Equal Protection Clause requires States to apportion based on voter population. First, the "drafters of the Fourteenth Amendment, on which *Reynolds* itself rests, do appear to have debated th[e] question, and rejected a proposal rooted in—among other things—the principle of electoral equality." *Id.* Second, the "[d]ebates over the precise basis for apportionment of Congress among the states proved a contentious issue throughout the process that led to the creation of section 2 of the [Fourteenth] Amendment." *Id.* In their "debate over

whether to base apportionment on potential voters, citizens, or population," the framers recognized "that aliens were unevenly distributed throughout the country," and that the western States contained an "overabundance of males." *Id.* Northern States opposed apportionment based on citizenship because they had large alien populations, and the New England States opposed apportionment based on "eligible voters rather than total population" due to the "relative preponderance of women in those states." *See id.* at 527 n.18 (citing Joseph T. Sneed III, Footprints on the Rocks of the Mountain: An Account of the Fourteenth Amendment 103–04, 145 (1997)).

The framers of the Fourteenth Amendment did not conclusively settle this debate. *Id.* at 527 The final version of Section 2 instead provides "generally for the use of total population figures for purposes of allocating the federal House of Representatives among the states" while also including a "mechanism to insure that egregious departures from the principle of *electoral* equality—the disenfranchisement of adult male 'citizens'—would be penalized." *Id.* (discussing U.S. Const. amend. XIV, § 2). In light of this history, *Chen* expressed "some difficulty in reading the Equal Protection Clause to require the adoption of a particular theory of political equality." *Id.* The Court's recognition, in *Burns*, that the Equal Protection Clause does not require the use of a particular apportionment base accords with this history of the Fourteenth Amendment.

Plaintiffs cannot avoid the Fourteenth Amendment's text and history by characterizing the State's argument as an attempt to revive the federal analogies that this Court rejected in *Gray* and *Reynolds*. *See* Br. 42–44. Texas is not trying to justify its practices by simply analogizing to a procedure in federal elections expressly authorized by the Constitution. And Texas is not trying to justify vote-weighting or its functional equivalent, which the Court also rejected in *Gray* and *Reynolds*. Rather than claim that States should be able to borrow practices established in the Constitution for federal elections, Texas relies on the text and history of the Fourteenth Amendment, which confirm that States generally do not violate the Equal Protection Clause by choosing a method of population-based apportionment.

In *Gray* and *Reynolds*, the States argued that certain structural features of the federal government—namely, the Electoral College and the apportionment of two Senate seats and at least one congressional seat to each State regardless of population—provided constitutional approval of weighted votes and apportionment of state legislative seats without regard to population. *See Gray*, 372 U.S. at 376–78; *Reynolds*, 377 U.S. at 571–72. The Court rejected those arguments because the constitutional structure of the federal government did not apply to the States. *Gray*, for example, explained that the "conception of political equality" that animated the Electoral College "belongs to a bygone day, and should not be considered in determining what the Equal

Protection Clause of the Fourteenth Amendment requires in statewide elections." 372 U.S. at 376 n.8. And in *Reynolds*, the Court stated that "the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted." 377 U.S. at 573. That system, it explained, was "conceived out of compromise and concession," which arose "from unique historical circumstances." *Id.* at 574.

The State's textual argument in this case bears no resemblance to the analogies proposed and rejected in *Gray* and *Reynolds*. The Equal Protection Clause's general language and Section 2's provision for population-based allotment of congressional seats were framed by the same body, at the same time, in the same unique historical circumstances. The Fourteenth Amendment's conspicuous failure to prescribe a method of state legislative apportionment therefore does not support plaintiffs' claim of invidious discrimination.

C. States Are Not Required to Reapportion Based on Total Population.

A State's decision to reapportion based on total population is generally not invidious discrimination for the reasons stated above. But if a State chooses to reapportion using reliable data on the citizen population or the voting-eligible population, that decision would not violate the Equal Protection Clause either. A State's good-faith effort to equalize

the number of citizens or voting-eligible citizens in state legislative districts also satisfies the one-person, one-vote principle.

The Ninth Circuit's contrary holding in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), is inconsistent with this Court's application of the Equal Protection Clause. In *Garza*, the Ninth Circuit reviewed the constitutionality of a court-drawn remedial plan entered after a judgment that the Los Angeles County Board of Supervisors intentionally discriminated against Hispanic voters, in violation of the Equal Protection Clause and the Voting Rights Act. *Id.* at 771. Although California law required the use of total population in redistricting, *id.* at 774, the county argued that the court-drawn plan's use of total population rather than voter population unconstitutionally overweighted the votes of citizens in a district with a higher proportion of non-citizens. *Id.* at 773.

The Ninth Circuit properly rejected the county's argument that the Equal Protection Clause required voter population to be used in apportioning. It noted that *Burns* "seems to permit states to consider the distribution of the voting population as well as that of the total population in constructing electoral districts," but it does not "*require* states to do so." *Id.* at 774 (citing *Burns*, 384 U.S. at 91–92). That observation about *Burns* was sufficient to resolve the claim and should have ended the analysis.

But *Garza* went further and erroneously pronounced that the Constitution *requires*

apportionment based on *total* population.[11] *Id.* at 774–76. In so holding, the Ninth Circuit contradicted *Burns*, which upheld an apportionment using registered voters as the population base. *See* 384 U.S. at 96–97.

The Ninth Circuit's incorrect determination reflects the same analytical flaw as plaintiffs' argument in this case. Instead of asking whether the government had engaged in invidious vote dilution under the Equal Protection Clause, *see supra* Part I, both plaintiffs and the Ninth Circuit focused on selected quotations from this Court's one-person, one-vote decisions. *See* Br. 19–29. The Ninth Circuit reached a different conclusion only because it favored different quotations than those selected by plaintiffs. For example, the Ninth Circuit relied primarily on the Court's statement in *Reynolds* that "the fundamental principle of representative government is one of equal

---

[11] The Ninth Circuit apparently assumed that the Constitution must require States to use a particular apportionment base, *cf.* Br. 28–29, but the Constitution need not compel a single course of action, and it does not do so here. In *Wisconsin v. City of New York*, 517 U.S. 1, 23–24 (1996), for example, the Court held that the Secretary of Commerce's decision not to statistically adjust the initial census enumeration was a reasonable exercise of his authority, delegated by Congress, to conduct an "actual Enumeration" of the population. Echoing the Court's finding of "no constitutionally founded reason to interfere" in *Burns*, 384 U.S. at 92, the Court in *Wisconsin* found no constitutional basis "for preferring numerical accuracy to distributive accuracy, or for preferring gross accuracy to some particular measure of accuracy. The Constitution itself provides no real instruction on this point " 517 U.S. at 18.

representation for equal numbers of people." *Garza*, 918 F.2d at 774 (quoting *Reynolds*, 377 U.S. at 560–61). Noting that the framers required congressional seats to be apportioned based on total population, despite their awareness that total population "would include categories of persons who were ineligible to vote," the Ninth Circuit concluded that total population is an appropriate apportionment base. *Id.*

But *Garza* went on to determine that the Constitution required apportionment based on total population because equalizing voter population would cause "serious population inequalities across districts" and diminish non-voters' access to elected representatives. *Id.* It stressed that "[t]he purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure 'equal representation for equal numbers of people.'" *Id.* at 775 (quoting *Kirkpatrick*, 394 U.S. at 531). And it concluded that restricting "individuals' free access to elected representatives impermissibly burdens their right to petition the government." *Id.* (citing *Eastern R.R. President's Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961)). Because apportionment based on voter population would lead to a greater total population in districts with higher concentrations of non-voters, the Ninth Circuit concluded that it would "dilute the access of voting age citizens in that district to their representative, and would similarly abridge the right of aliens and minors to petition that representative." *Id.* In the majority's view, this would result in a denial of equal protection. *Id.* at 776.

Contrary to the view of the Ninth Circuit, plaintiffs are correct that non-voters would not have a cognizable one-person, one-vote (that is, invidious vote dilution) claim under the Equal Protection Clause or a valid First Amendment claim on this basis. *See* Br. 39–40. Non-voters cannot experience vote dilution because they cannot cast a vote that could possibly be diluted. Nor does the First Amendment's Petition Clause require that individuals have equal "access" to government, where "access" refers not to ability to petition but rather persuasiveness or effectiveness of petitioning. *See id.* Any rule requiring such equal "access" could halt government functions.

Dissenting in relevant part in *Garza*, Judge Kozinski correctly reasoned that the Ninth Circuit was wrong to interpret the Equal Protection Clause as requiring apportionment based on total population. *See* 918 F.2d at 784 (Kozinski, J., concurring in part and dissenting in part) (recognizing that "*Burns* would be inexplicable" if total population were required). But rather than allow governments to choose between total, citizen, or voting-eligible population, Judge Kozinski incorrectly interpreted the Equal Protection Clause to *require* governments to use *voting-eligible* population. *Id.* at 781–84. He cataloged this Court's statements in one-person, one-vote cases, and concluded that they offered "conflicting principles." *Id.* at 781. Judge Kozinski therefore explained "that reliance on verbal formulations is not enough; we must try to distill the

theory underlying the principle of one person one vote and, on the basis of that theory, select the philosophy embodied in the fourteenth amendment." *Id.* He then identified the apportionment principles of "electoral equality" and "equality of representation," and reasoned that "what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation." *Id.* at 782.

Judge Kozinski's ultimate conclusion does not square with this Court's recognition in *Burns* that the Equal Protection Clause does not compel governments to use a particular population base when apportioning. But he was right to acknowledge that "reliance on verbal formulations is not enough; we must try to distill the theory underlying the principle of one person one vote." *Id.* at 781. The underlying theory, however, is simply that the Equal Protection Clause prohibits invidious discrimination—here, invidious vote dilution. *See supra* Part I. Seen in this light, there is no tension between the Court's various statements acknowledging that the one-person, one-vote principle is concerned with vote dilution and its statements that States can reapportion using total population. Both are true, and this Court's cases confirm that a State generally does not commit invidious vote dilution when it equalizes total population in apportioning.

The Ninth Circuit's reasoning in *Garza* was therefore flawed. And *Burns* confirms that while the Equal Protection Clause requires States to use some population base in reapportioning, States generally do

not violate the Clause by selecting total, citizen, or voting-eligible population.

III. Texas Did Not Violate the Equal Protection Clause by Apportioning Senate Seats Based on Total Population.

Texas did not engage in invidious vote dilution when it substantially equalized total population among its Senate districts. Texas's decision to apportion Senate seats based on total population was wholly legitimate, especially given this Court's pronouncements that federal census data are reliable and the fact that the census currently does not record citizenship. Moreover, practical problems arise in trying to equalize both total and voter population when reapportioning, and plaintiffs' allegations do not suggest that Texas could do so here while maintaining compact and contiguous districts.

A. Texas Did Not Engage in Invidious Vote Dilution.

Plaintiffs have acknowledged at all stages of this litigation that the Texas Senate reapportionment (Plan S172) has a deviation from ideal of 8.04%, using total population. *See* Br. 46; Supp. J.S. App. 3 ("[T]he Plan's total population deviation from ideal was 8.04%."). Under *Brown*, "an apportionment plan with a maximum population deviation under 10% falls within [the] category of minor deviations" that is "insufficient to make out a prima facie case of invidious discrimination under the Fourteenth

Amendment so as to require justification by the State." 462 U.S. at 842.

Furthermore, plaintiffs have asserted that Texas did not even consider voting-eligible population in its apportionment. *See, e.g.*, J.S. App. 18a–19a ("Texas did not take into account the number of electors or potential electors in the proposed districts when crafting Plan S172."); Br. 45. Plaintiffs thus effectively concede that Texas did not intentionally dilute their votes. If there were evidence that the Legislature chose a particular population base for the purpose of diluting votes, then that could be enough to sustain an equal-protection claim of invidious vote dilution. Here, though, plaintiffs have not alleged any basis for a claim that Texas intended, through Plan S172, to dilute or underweight their votes. This case presents a clear "example of an apportionment plan the population variations of which are entirely the result of the consistent and nondiscriminatory application of a legitimate state policy." *Brown*, 462 U.S. at 844.

B. Census Data Provide a Reliable Measure of Population.

States have a legitimate interest in using reliable data to apportion state legislative districts, and Texas's choice to rely upon census data is a permissible one. While other data might also be permissibly used, the Court has already deemed federal census data reliable. The use of federal census data therefore does not show invidious discrimination,

and some metrics proposed by plaintiffs present more uncertainties.

The federal census enumeration provides the most reliable population data currently available. Census data are collected through an actual count (as opposed to a sampling) of the population, and reliable data are released down to very small units of geography (census blocks). The Court has described census data as "the best population data available." *Kirkpatrick*, 394 U.S. at 528; *see also Karcher*, 462 U.S. at 738 ("the census data provide the only reliable—albeit less than perfect—indication of the districts' 'real' relative population levels"). Although census data are not a perfect indication of real population levels, the Court has determined that the census count of population provides a degree of "certainty [that] is sufficient for decisionmaking." *Id.* at 737.

Plaintiffs suggest that Texas should have apportioned its Senate districts based on citizen-voting-age population ("CVAP"), Br. 45–49, but CVAP data are not provided by the census. While the census provides the most reliable enumeration of total population, it does not currently record citizenship and therefore does not provide a measurement of CVAP. The 2010 census consisted solely of a "short form questionnaire" that collects basic demographic

information about place of residence, age, gender, race, and household relationships.[12]

The Census Bureau currently provides estimates of citizenship data based on the American Community Survey ("ACS"). Unlike the census, the ACS is not an enumeration. ACS data represent a continuous survey of approximately two million final interviews per year (out of approximately three million addresses sampled).[13] The resulting data are provided with margins of error representing a 90% confidence level.[14] The Census Bureau has described the differences between the ACS data and the decennial census as follows: "While the main function of the decennial census is to provide *counts* of people for the purpose of congressional apportionment and legislative redistricting, the primary purpose of the ACS is to measure the changing social and economic *characteristics* of the U.S. population."[15] As areas

---

[12] *See* U.S. Census Bureau, United States Census 2010 (2009), http://www.census.gov/2010census/partners/pdf/factSheet_General.pdf.

[13] *See* ACS, U.S. Census Bureau, A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know 3 (Oct. 2008), https://www.census.gov/content/dam/Census/library/publications/2008/acs/ACSGeneralHandbook.pdf [hereinafter ACS Handbook]; *see also* ACS, U.S. Census Bureau, Sample Size, https://www.census.gov/acs/www/methodology/sample-size-and-data-quality/sample-size/ (providing annual sample size data) (last visited Sept. 15, 2015).

[14] *See* ACS Handbook at 10.

[15] *Id.* at 4.

decrease in size, more statistical error is introduced due to the small sample sizes available; this in turn leads to a larger margin of error in smaller districts.[16]

Registered-voter data—the other metric urged by plaintiffs, Br. 9—present additional reliability concerns that States may legitimately prefer to avoid. Voter-registration levels vary from year to year based on factors beyond the States' control. Among other considerations, it is not clear whether it would be appropriate to favor presidential election years, due to higher levels of registration in those years, or whether redistricting would need to take place more frequently to avoid locking in for ten years the results of actual voter turnout on a given election day. The Court recognized these concerns in *Burns*. *See* 384 U.S. at 96–97.

This is not to say that the Constitution would forbid the States to rely on ACS data or that it requires them to use total census population as an apportionment base. The mere use of ACS data would not give rise to an inference of invidious vote dilution, and a State could reasonably decide to equalize the CVAP population in its legislative districts and deem the existing ACS data from the Census Bureau sufficiently reliable. Or a State might conduct its own

---

[16] *See id.* at A-11 (explaining that the "relationship between sample size and [sampling error] is the reason ACS estimates for less populous areas are only published using multiple years of data: to take advantage of the larger sample size that results from aggregating data from more than one year.").

enumeration to develop more robust data on citizenship and voting-age citizenship for use in redistricting.[17] As long as the State's choice is not irrational or made for an impermissible purpose, and as long as it makes a good-faith effort to achieve substantial equality in the chosen population, it has not invidiously diluted any person's vote.

A State therefore does not act arbitrarily or irrationally if it prefers to rely on the federal census. And as long as it does not rely on total population for the purpose of diluting voting strength, it does not violate the Equal Protection Clause.

C. Plaintiffs Propose Unworkable Apportionment Methods.

Plaintiffs' proposed standards for apportionment would be unworkable, and they would mire the Judiciary in the most minute details of the apportionment process. *Cf., e.g., Gaffney*, 412 U.S. at 749–50 ("That the Court was not deterred by the hazards of the political thicket when it undertook to adjudicate the reapportionment cases does not mean that it should become bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so.").

---

[17] *See, e.g., Baker*, 369 U.S. at 188, 191 (noting that while the Tennessee Constitution required a state enumeration, the State had "abandoned separate enumeration in favor of reliance upon the Federal Census").

The variety of voter-population metrics discussed in plaintiffs' brief demonstrates the practical difficulties that would arise if the Court were to require voter population to be used in apportioning state legislative districts. *See* J.S. App. 26a. Plaintiffs group together all of the various metrics—CVAP, total voter registration, and non-suspense voter registration—as equalizing voters. J.S. App. 27a, 30a. But each of these metrics represents a different population, *see* Br. 9 nn.2, 3, and this Court would have to determine whether one or all of these would be constitutionally acceptable. According to plaintiffs' complaint, the variation among just these "voter equalization" approaches presents a range of nearly a 10% deviation: from 45.95% (using the 5-year CVAP estimate from the 2007–2011 ACS survey) to 55.06% (using total voter registration from 2010). *See* Br. 9. That deviation is significant given that the Court has looked to a 10% deviation to determine whether a prima facie case of invidious vote dilution has been established. *See, e.g.*, *Brown*, 462 U.S. at 842–43.

To the extent plaintiffs argue that Texas must equalize both total and voter population, Br. 46, they have not plausibly alleged that Texas could do so while still maintaining reasonably compact and contiguous Senate districts. Plaintiffs offer only conclusory allegations from their retained expert:

> Using standard available GIS software, one can readily adjust the boundaries of the districts in Plan S172 to create numerous alternatives to Plan S172. I observed that it is

> possible to devise a number of feasible alternative 31-district plans with different combinations of total population deviations and CVAP deviations. I was not asked to, and did not attempt to, devise a plan that would optimally balance these two deviations.

Supp. J.S. App. 2. Plaintiffs' expert does not specify the extent of deviation he achieved in attempting to balance CVAP and total-population equality. Instead, he offers vague assurances about "minimizing total population and CVAP deviations," eliminating "gross deviations," avoiding "significantly larger deviations in total population," and "substantially equaliz[ing]" the distribution of CVAP. Supp. J.S. App. 3. Plaintiffs thus fail to explain how, or to what extent, Texas could simultaneously achieve substantial equality in total and voting-eligible population, let alone how that objective would affect other traditional redistricting principles such as compactness, contiguity, and preservation of political subdivisions. *See, e.g.*, *Reynolds*, 377 U.S. at 578; *Brown*, 462 U.S. at 842.

Plaintiffs presented no potential redistricting map to the district court, and they do not allege that they (or anyone else) submitted a map reflecting their preferred apportionment method to the Legislature. If a plan can violate the Equal Protection Clause by having greater than a 10% variance in total population, but also violate equal protection by having greater than a 10% variance in actual voters, there will almost certainly be situations where these two are irreconcilable. This problem of balancing would be

further compounded for the Texas House of Representatives, where the State is divided into 150 much smaller districts. *See* Tex. Const. art. III, § 2.

Furthermore, plaintiffs agree that States can legitimately consider the number of inhabitants in a district when reapportioning. J.S. App. 31a; Br. 41. Census population has the benefit of not only being a reliable metric for equalizing population across districts, but also indicating a rough demand for government services. Use of census data can allow States to reapportion by furthering the legitimate goal of ensuring that elected officials are not tasked with representing a substantially greater number of constituents than other officials. Plaintiffs are correct that non-voters do not have cognizable equal protection or First Amendment claims in this context. Br. 39–40. But while the Constitution does not require the State to give priority to these particular interests, they are legitimate goals that can also be weighed in choosing an apportionment method.

In sum, Texas did not engage in invidious discrimination when it chose—like countless other jurisdictions across the country—to reapportion by equalizing total population. Texas therefore did not violate the Equal Protection Clause.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant
Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

LISA BENNETT
Assistant Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@
texasattorneygeneral.gov
(512) 936-1700

SEPTEMBER 2015

APPENDIX

APPENDIX

APPORTIONMENT BASE PROVIDED BY STATE CONSTITUTIONS AND STATUTES

Ala. The members of the house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States, which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken.

Ala. Const. art. IX, § 198.

It shall be the duty of the legislature at its first session after taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of senators, and to divide the state into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more; and such districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken; provided,

that counties created after the next preceding apportioning session of the legislature may be attached to senatorial districts.

Ala. Const. art. IX, § 200.

Alaska The Redistricting Board shall reapportion the house of representatives and the senate immediately following the official reporting of each decennial census of the United States. Reapportionment shall be based upon the population within each house and senate district as reported by the official decennial census of the United States.

Alaska Const. art. VI, § 3.

The Redistricting Board shall establish the size and area of house districts, subject to the limitations of this article . . . . Each shall contain a population as near as practicable to the quotient obtained by dividing the population of the state by forty. Each senate district shall be composed as near as practicable of two contiguous house districts.

Alaska Const. art. VI, § 6.

Ariz. The independent redistricting commission shall establish congressional and legislative districts. The commencement

of the mapping process for both the congressional and legislative districts shall be the creation of districts of equal population in a grid-like pattern across the state. Adjustments to the grid shall then be made as necessary to accommodate the goals as set forth below . . . state legislative districts shall have equal population to the extent practicable . .

Ariz. Const. art. IV, pt. 2 § 1(14).

Party registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance with the above goals.

Ariz. Const. art. IV, pt. 2 § 1(15).

For purposes of adopting legislative and congressional district boundaries, the legislature or any entity that is charged with recommending or adopting legislative or congressional district boundaries shall make its recommendations or determinations using population data from the United States bureau of the census identical to those from the actual enumeration conducted by the bureau for the apportionment of the representatives of the United States house of representatives in the United States decennial census and

shall not use census bureau population counts derived from any other means, including the use of statistical sampling, to add or subtract population by inference.

Ariz. Rev. Stat. Ann. § 16-1103.

Ark. The House of Representatives shall consist of one hundred members and each county existing at the time of any apportionment shall have at least one representative; the remaining members shall be equally distributed (as nearly as practicable) among the more populous counties of the State, in accordance with a ratio to be determined by the population of said counties as shown by the Federal census next preceding any apportionment hereunder.

Ark. Const. art. VIII, § 2.

"The Board of Apportionment" hereby created shall, from time to time, divide the state into convenient senatorial districts in such manner as that the Senate shall be based upon the inhabitants of the state, each senator representing, as nearly as practicable, an equal number thereof; each district shall have at least one senator.

Ark. Const. art. VIII, § 3.

Cal. In the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the Citizens Redistricting Commission described in Section 2 shall adjust the boundary lines of the congressional, State Senatorial, Assembly, and Board of Equalization districts (also known as "redistricting") in conformance with the standards and process set forth in Section 2.

Cal. Const. art. XXI, § 1.

Districts shall comply with the United States Constitution. Congressional districts shall achieve population equality as nearly as is practicable, and Senatorial, Assembly, and State Board of Equalization districts shall have reasonably equal population with other districts for the same office, except where deviation is required to comply with the federal Voting Rights Act or allowable by law.

Cal. Const. art. XXI, § 2(d)(1).

[T]he Legislature hereby requests the Citizens Redistricting Commission to deem each incarcerated person as residing at his or her last known place of residence, rather than at the institution of his or her incarceration, and to utilize

> the information furnished to it pursuant to subdivision (a) in carrying out its redistricting responsibilities under Article XXI of the California Constitution. The Legislature also requests the commission to . . . (2) Deem an inmate in state custody in a facility within California for whom the last known place of residence is either outside California or cannot be determined, or an inmate in federal custody in a facility within California, to reside at an unknown geographical location in the state and exclude the inmate from the population count for any district, ward, or precinct.
>
> Cal. Elec. Code § 21003.

Colo. The state shall be divided into as many senatorial and representative districts as there are members of the senate and house of representatives respectively, each district in each house having a population as nearly equal as may be, as required by the constitution of the United States, but in no event shall there be more than five percent deviation between the most populous and the least populous district in each house.

Colo. Const. art. V, § 46.

> After each federal census of the United States, the senatorial districts and representative districts shall be established, revised, or altered, and the members of the senate and the house of representatives apportioned among them, by a Colorado reapportionment commission

Colo. Const. art. V, § 48(1)(a).

Conn. The establishment of congressional districts and of districts in the general assembly shall be consistent with federal constitutional standards.

Conn. Const. art. III, § 5.

> The assembly and senatorial districts and congressional districts as now established by law shall continue until the regular session of the general assembly next after the completion of the taking of the next census of the United States. On or before the fifteenth day of February next following the year in which the decennial census of the United States is taken, the general assembly shall appoint a reapportionment committee consisting of four members of the senate . . . .

Conn. Const. art. III, § 6.

Del. Each existing Representative District as set forth in Section 2 of this Article, with a population residing therein in excess of 15,000, as shown by the last official federal decennial census shall be entitled to one additional Representative for each additional 15,000 population or major fraction thereof residing within the District. Upon any Representative District, as set forth in Section 2 of this Article, being entitled to more than one Representative, it shall be subdivided into new Representative Districts. . . . Each new Representative District shall, insofar as is possible, be formed of contiguous territory; shall be as nearly equal in population as possible to the other new districts being created . . . .

Del. Const. art. II, § 2A.

In determining the boundaries of the several representative and senatorial districts within the State, the General Assembly shall use the following criteria. Each district shall, insofar as is possible . . . [b]e nearly equal in population . . . .

Del. Code Ann. tit. 29, § 804.

The apportionment provided for by this chapter shall continue in effect until the official reporting by the President of the

United States of the next federal decennial census.

Del. Code Ann. tit. 29, § 805.

The General Assembly, in determining the reapportionment and redistricting for the State, applying the criteria set forth in § 804 of this title, and using the official reporting of the federal decennial census as set forth in § 805 of this title, shall not count as part of the population in a given district boundary any incarcerated individual who: (1) Was incarcerated in a state or federal correctional facility, as determined by the decennial census; and (2) Was not a resident of the State before the person's incarceration.

Del. Code Ann. tit. 29, § 804A.

Fla. Unless compliance with the standards in this subsection conflicts with the standards in subsection (a) or with federal law, districts shall be as nearly equal in population as is practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries.

Fla. Const. art. III, § 21(b).

Each decennial census of the state taken by the United States shall be an official census of the state.

Fla. Const. art. X, § 8(a).

Each decennial census, for the purpose of classifications based upon population, shall become effective on the thirtieth day after the final adjournment of the regular session of the legislature convened next after certification of the census.

Fla. Const. art. X, § 8(b).

Ga. Such districts shall be composed of contiguous territory. The apportionment of the Senate and of the House of Representatives shall be changed by the General Assembly as necessary after each United States decennial census.

Ga. Const. art. III, § 2, para. II.

Haw. The commission shall allocate the total number of members of each house of the state legislature being reapportioned among the four basic island units, namely: (1) the island of Hawaii, (2) the islands of Maui, Lanai, Molokai and Kahoolawe, (3) the island of Oahu and all other islands not specifically enumerated, and (4) the islands of Kauai and Niihau,

using the total number of permanent residents in each of the basic island units and computed by the method known as the method of equal proportions . . . .

Haw. Const. art. IV, § 4.

Upon the determination of the total number of members of each house of the state legislature to which each basic island unit is entitled, the commission shall apportion the members among the districts therein and shall redraw district lines where necessary in such manner that for each house the average number of permanent residents per member in each district is as nearly equal to the average for the basic island unit as practicable.

Haw. Const. art. IV, § 6.

Idaho

The members of the legislature following the decennial census of 1990 and each legislature thereafter shall be apportioned to not less than thirty nor more than thirty-five legislative districts of the state as may be provided by law.

Idaho Const. art. III, § 4.

Congressional and legislative redistricting plans considered by the commission, and plans adopted by the commission,

shall be governed by the following criteria: (1) The total state population as reported by the U.S. census bureau, and the population of subunits determined therefrom, shall be exclusive permissible data. . . .

Idaho Code Ann. § 72-1506.

Ill. Legislative Districts shall be compact, contiguous and substantially equal in population.

Ill. Const. art. IV, § 3(a).

In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative Districts and the Representative Districts.

Ill. Const. art. IV, § 3(b).

Each Legislative District shall be divided into two Representative Districts.

Ill. Const. art. IV, § 2(b).

Ind. The General Assembly elected during the year in which a federal decennial census is taken shall fix by law the number of Senators and Representatives and apportion them among districts according to

the number of inhabitants in each district, as revealed by that federal decennial census.

Ind. Const. art. IV, § 5.

Iowa The state shall be apportioned into senatorial and representative districts on the basis of population.

Iowa Const. art. III, § 34.

Senatorial and representative districts, respectively, shall each have a population as nearly equal as practicable to the ideal population for such districts, determined by dividing the number of districts to be established into the population of the state reported in the federal decennial census. Senatorial districts and representative districts shall not vary in population from the respective ideal district populations except as necessary to comply with one of the other standards enumerated in this section. In no case shall the quotient, obtained by dividing the total of the absolute values of the deviations of all district populations from the applicable ideal district population by the number of districts established, exceed one percent of the applicable ideal district population.

Iowa Code § 42.4(1)(a).

> The general assembly may provide by law for factors in addition to population, not in conflict with the Constitution of the United States, which may be considered in the apportioning of senatorial districts. No law so adopted shall permit the establishment of senatorial districts whereby a majority of the members of the senate shall represent less than forty percent of the population of the state as shown by the most recent United States decennial census.
>
> Iowa Const. art. III, § 34.

Kan. [T]he legislature shall by law reapportion the state senatorial districts and representative districts on the basis of the population of the state as established by the most recent census of population taken and published by the United States bureau of the census. Senatorial and representative districts shall be reapportioned upon the basis of the population of the state adjusted: (1) To exclude nonresident military personnel stationed within the state and nonresident students attending colleges and universities within the state; and (2) to include military personnel stationed within the state who are residents of the state and students attending colleges and universities within

the state who are residents of the state in the district of their permanent residence.

Kan. Const. art. X, §1(a).

The number of representatives and senators shall be regulated by law, but shall not exceed one hundred twenty-five representatives and forty senators. Representatives and senators shall be elected from single-member districts prescribed by law.

Kan. Const. art. II, § 2.

Ky. The first General Assembly after the adoption of this Constitution shall divide the State into thirty-eight Senatorial Districts, and one hundred Representative Districts, as nearly equal in population as may be without dividing any county, except where a county may include more than one district, which districts shall constitute the Senatorial and Representative Districts for ten years. Not more than two counties shall be joined together to form a Representative District: Provided, In doing so the principle requiring every district to be as nearly equal in population as may be shall not be violated. . . . If, in making said districts, inequality of population should be unavoidable, any advantage resulting therefrom shall be

given to districts having the largest territory. No part of a county shall be added to another county to make a district, and the counties forming a district shall be contiguous.

Ky. Const. § 33.

La. By the end of the year following the year in which the population of this state is reported to the president of the United States for each decennial federal census, the legislature shall reapportion the representation in each house as equally as practicable on the basis of population shown by the census.

La. Const. art. III, § 6(A).

Me. The number of Representatives shall be divided into the number of inhabitants of the State exclusive of foreigners not naturalized according to the latest Federal Decennial Census or a State Census previously ordered by the Legislature to coincide with the Federal Decennial Census, to determine a mean population figure for each Representative District.

Me. Const. art. IV, pt. 1, § 2.

The Legislature which shall convene in the year 2013, and also the Legislature

which shall convene in the year 2021 and every tenth year thereafter, shall cause the State to be divided into districts for the choice of a Senator from each district, using the same method as provided in Article IV, Part First, Section 2 for apportionment of Representative Districts.

Me. Const. art. IV, pt. 2, § 2.

Md. Each legislative district shall contain one (1) Senator and three (3) Delegates.

Md. Const. art. III, § 3.

Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population.

Md. Const. art. III § 4.

Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the legislative districts for electing of the members of the Senate and the House of Delegates.

Md. Const. art. III, § 5.

The population count used after each decennial census for the purpose of creating the legislative districting plan for the General Assembly: (1) may not

include individuals who: (i) were incarcerated in State or federal correctional facilities, as determined by the decennial census; and (ii) were not residents of the State before their incarceration; and (2) shall count individuals incarcerated in the State or federal correctional facilities, as determined by the decennial census, at their last known residence before incarceration if the individuals were residents of the State.

Md. Code Ann., State Gov't § 2-2A-01.

Mass. The General Court shall, at its first regular session after the year in which said census was taken, divide the Commonwealth into one hundred and sixty representative districts of contiguous territory so that each representative will represent an equal number of inhabitants, as nearly as may be . . . .

Mass. Const. amend. art. CI § 1.

The General Court shall, at its first regular session after the year in which said census is taken, divide the Commonwealth into forty districts of contiguous territory, each district to contain, as nearly as may be, an equal

number of inhabitants according to said census . . .

Mass. Const. amend. art. CI § 2.

Mich. The house of representatives shall consist of 110 members elected for two-year terms from single member districts apportioned on a basis of population as provided in this article.

Mich. Const. art. IV, § 3.

Senate and house of representatives districts shall have a population not exceeding 105% and not less than 95% of the ideal district size for the senate or the house of representatives unless and until the United States supreme court establishes a different range of allowable population divergence for state legislative districts.

Mich. Comp. Laws § 4.261(1)(d).

In districting the state for the purpose of electing senators after the official publication of the total population count of each federal decennial census, each county shall be assigned apportionment factors equal to the sum of its percentage of the state's population as shown by the last regular federal decennial census computed to the nearest one-one hundredth of

one percent multiplied by four and its percentage of the state's land area computed to the nearest one-one hundredth of one percent.

Mich. Const. art. IV, § 2.

Minn. The representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof.

Minn. Const. art. IV, § 2.

At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts. Senators shall be chosen by single districts of convenient contiguous territory. No representative district shall be divided in the formation of a senate district.

Minn. Const. art. IV § 3.

Miss. The committee shall divide the number of members of the house of representatives that it recommends within constitutional limitations into the total population of the state as reported in each census to determine the number of persons which

constitutes the norm to be represented by a representative.

Miss. Code § 5-3-99(2).

The committee shall divide the number of members of the senate that it recommends within constitutional limitations into the total population of the state as reported in each census to determine the number of persons which constitutes the norm to be represented by a senator.

Miss. Code § 5-3-99(1).

Mo. The commission shall reapportion the representatives by dividing the population of the state by the number one hundred sixty-three and shall establish each district so that the population of that district shall, as nearly as possible, equal that figure.

Mo. Const. art. III, § 2.

The commission shall reapportion the senatorial districts by dividing the population of the state by the number thirty-four and shall establish each district so that the population of that district shall, as nearly as possible, equal that figure.

Mo. Const. art. III, § 7.

The last decennial census of the United States shall be used in apportioning representatives and determining the population of senatorial and representative districts. Such districts may be altered from time to time as public convenience may require.

Mo. Const. art. III, § 10.

Mont. The state shall be divided into as many districts as there are members of the house, and each district shall elect one representative. Each senate district shall be composed of two adjoining house districts, and shall elect one senator. Each district shall consist of compact and contiguous territory. All districts shall be as nearly equal in population as is practicable.

Mont. Const. art. V, § 14(1).

Within 90 days after the official final decennial census figures are available, the commission shall file its final plan for congressional districts with the secretary of state and it shall become law.

Mont. Const. art. V, § 14(2).

Neb. The Legislature shall by law determine the number of members to be elected and divide the state into legislative districts. In the creation of such districts, any county that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct legislative districts, as nearly equal in population as may be and composed of contiguous and compact territory. One member of the Legislature shall be elected from each such district. The basis of apportionment shall be the population excluding aliens, as shown by the next preceding federal census.

Neb. Const. art. III, § 5.

The State of Nebraska is hereby divided into forty-nine legislative districts. Each district shall be entitled to one member in the Legislature.

Neb. Rev. Stat. § 50-1153.

Nev. It shall be the mandatory duty of the legislature at its first session after the taking of the decennial census of the United States in the year 1950, and after each subsequent decennial census, to fix by law the number of senators and assemblymen, and apportion them among the several counties of the State, or

among legislative districts which may be established by law, according to the number of inhabitants in them, respectively.

Nev. Const. art. IV, § 5.

The enumeration of the inhabitants of this State shall be taken under the direction of the Legislature if deemed necessary in AD Eighteen hundred and Sixty five, AD Eighteen hundred and Sixty seven, AD Eighteen hundred and Seventy five, and every ten years thereafter; and these enumerations, together with the census that may be taken under the direction of the Congress of the United States in A.D. Eighteen hundred and Seventy, and every subsequent ten years shall serve as the basis of representation in both houses of the Legislature.

Nev. Const. art. XV, § 13.

N.H. As soon as possible after the convening of the next regular session of the legislature, and at the session in 1971, and every ten years thereafter, the legislature shall make an apportionment of representatives according to the last general census of the inhabitants of the

state taken by authority of the United States or of this state.

N.H. Const. pt. 2, art. 9.

The general court shall have the power to provide by statute for making suitable adjustments to the general census of the inhabitants of the state taken by the authority of the United States or of this state on account of non-residents temporarily residing in this state.

N.H. Const. pt. 2, art. 9-a.

When the population of any town or ward, according to the last federal census, is within a reasonable deviation from the ideal population for one or more representative seats the town or ward shall have its own district of one or more representative seats.

N.H. Const. pt. 2, art. 11.

And that the state may be equally represented in the senate, the legislature shall divide the state into single-member districts, as nearly equal as may be in population, each consisting of contiguous towns, city wards and unincorporated places, without dividing any town, city ward or unincorporated place. The legislature shall form the single-member

districts at its next session after approval of this article by the voters of the state and thereafter at the regular session following each decennial federal census.

N.H. Const. pt. 2, art. 26.

N.J. The Assembly districts shall be composed of contiguous territory, as nearly compact and equal in the number of their inhabitants as possible, and in no event shall each such district contain less than eighty per cent nor more than one hundred twenty per cent of one-fortieth of the total number of inhabitants of the State as reported in the last preceding decennial census of the United States.

N.J. Const. art. IV, § 2, para. 3.

The Senate shall be composed of forty senators apportioned among Senate districts as nearly as may be according to the number of their inhabitants as reported in the last preceding decennial census of the United States and according to the method of equal proportions. Each Senate district shall be composed, wherever practicable, of one single county, and, if not so practicable, of two or more contiguous whole counties.

N.J. Const. art. IV, § 2, para. 1.

N.M. Once following publication of the official report of each federal decennial census hereafter conducted, the legislature may by statute reapportion its membership.

N.M. Const. art. IV, § 3, para. D.

The house of representatives is composed of seventy members to be elected from districts that are contiguous and that are as compact as is practical and possible.

N.M. Stat. Ann. § 2-7c-3.

The senate is composed of forty-two members to be elected from districts that are contiguous and that are as compact as is practical.

N.M. Stat. Ann. § 2-8d-2.

N.Y. Except as herein otherwise provided, the federal census taken in the year nineteen hundred thirty and each federal census taken decennially thereafter shall be controlling as to the number of inhabitants in the state or any part thereof for the purposes of the apportionment of members of assembly and readjustment or alteration of senate and assembly districts next occurring, in so far as such census and the tabulation

thereof purport to give the information necessary therefor.

N.Y. Const. art. III, § 4(a).

To the extent practicable, districts shall contain as nearly as may be an equal number of inhabitants. For each district that deviates from this requirement, the commission shall provide a specific public explanation as to why such deviation exists.

N.Y. Const. art. III, § 4(c)(2).

The quotient obtained by dividing the whole number of inhabitants of the state, excluding aliens, by the number of members of assembly, shall be the ratio for apportionment.

N.Y. Const. art. III, § 5.

For the purpose of apportioning senate and assembly districts pursuant to the foregoing provisions of this article, the term "inhabitants, excluding aliens" shall mean the whole number of persons.

N.Y. Const. art. III, § 5-a.

The assembly shall consist of one hundred fifty members chosen from the districts described within and apportioned among the counties on the basis of the number of

inhabitants of the state based on the Federal Census of two thousand ten . .

N.Y. State Law § 120.

The ratio for apportioning senators shall always be obtained by dividing the number of inhabitants, excluding aliens, by fifty.

N.Y. Const. art. III, § 4(d).

The senate shall consist of sixty-three members chosen from the districts described within and apportioned among the counties on the basis of the number of inhabitants of the state based on the Federal Census of two thousand ten, as adjusted pursuant to the provisions of part XX of chapter fifty-seven of the laws of two thousand ten.

N.Y. State Law § 123.

Until such time as the United States bureau of the census shall implement a policy of reporting each such incarcerated person at such person's residential address prior to incarceration, the task force shall use such data to develop a database in which all incarcerated persons shall be, where possible, allocated for redistricting purposes, such that each

geographic unit reflects incarcerated populations at their respective residential addresses prior to incarceration rather than at the addresses of such correctional facilities. For all incarcerated persons whose residential address prior to incarceration was outside of the state, or for whom the task force cannot identify their prior residential address, and for all persons confined in a federal correctional facility on census day, the task force shall consider those persons to have been counted at an address unknown and persons at such unknown address shall not be included in such data set created pursuant to this paragraph.

N.Y. Elec. Law § 83-m.

N.C. The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the representative districts and the apportionment of Representatives among those districts, subject to the following requirements: (1) Each Representative shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Representative represents being determined for this purpose by dividing the population of the district that he represents by the number

of Representatives apportioned to that district. . . .

N.C. Const. art. II, § 5.

The General Assembly, at the first regular session convening after the return of every decennial census of population taken by order of Congress, shall revise the senate districts and the apportionment of Senators among those districts, subject to the following requirements: (1) Each Senator shall represent, as nearly as may be, an equal number of inhabitants, the number of inhabitants that each Senator represents being determined for this purpose by dividing the population of the district that he represents by the number of Senators apportioned to that district. . . .

N.C. Const. art. II, § 3.

N.D. The legislative assembly shall guarantee, as nearly as is practicable, that every elector is equal to every other elector in the state in the power to cast ballots for legislative candidates.

N.D. Const. art. 4, § 2.

A legislative redistricting plan based on any census taken after 1999 must meet the following requirements: . . . 5.

Legislative districts must be as nearly equal in population as is practicable. Population deviation from district to district must be kept at a minimum.

N.D. Cent. Code § 54-03-01.5.

Ohio

The whole population of the state, as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "ninety-nine" and the quotient shall be the ratio of representation in the house of representatives for ten years next succeeding such apportionment.

Ohio Const. art. XI, § 2.

The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid

dividing a county in accordance with section 9 of this Article.

Ohio Const. art. XI, § 3.

The whole population of the state as determined by the federal decennial census or, if such is unavailable, such other basis as the general assembly may direct, shall be divided by the number "thirty-three" and the quotient shall be the ratio of representation in the senate for ten years next succeeding such apportionment.

Ohio Const. art. XI, § 2.

The population of each senate district shall be substantially equal to the ratio of representation in the senate, as provided in section 2 of this Article, and in no event shall any senate district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the senate as determined pursuant to this Article.

Ohio Const. art. XI, § 4.

Senate districts shall be composed of three contiguous House of Representatives districts.

Ohio Const. art. XI, § 11.

Okla. The number of members of the House of Representatives to which each county shall be entitled shall be determined according to the following formula: a. The total population of the state as ascertained by the most recent Federal Decennial Census shall be divided by the number one hundred and the quotient shall be the ratio of representation in the House of Representatives, except as otherwise provided in this Article. . . .

Okla Const. art. V, §10A.

The state shall be apportioned into forty-eight senatorial districts in the following manner: the nineteen most populous counties, as determined by the most recent Federal Decennial Census, shall constitute nineteen senatorial districts with one senator to be nominated and elected from each district; the fifty-eight less populous counties shall be joined into twenty-nine two-county districts with one senator to be nominated and elected from each of the two-county districts. In apportioning the State Senate,

consideration shall be given to population, compactness, area, political units, historical precedents, economic and political interests, contiguous territory, and other major factors, to the extent feasible.

Okla. Const. art. V, §9A.

Or. At the odd-numbered year regular session of the Legislative Assembly next following an enumeration of the inhabitants by the United States Government, the number of Senators and Representatives shall be fixed by law and apportioned among legislative districts according to population. A senatorial district shall consist of two representative districts. . . . The ratio of Senators and Representatives, respectively, to population shall be determined by dividing the total population of the state by the number of Senators and by the number of Representatives.

Or. Const. art. IV, § 6.

The Legislative Assembly or the Secretary of State, whichever is applicable, shall consider the following criteria when apportioning the state into congressional and legislative districts: (1)

Each district, as nearly as practicable, shall. . . (b) Be of equal population.

Or. Rev. Stat. § 188.010.

Pa. The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. In each year following the year of the Federal decennial census, a Legislative Reapportionment Commission shall be constituted for the purpose of reapportioning the Commonwealth.

Pa. Const. art. II, § 17(a).

No later than ninety days after either the commission has been duly certified or the population data for the Commonwealth as determined by the Federal decennial census are available, whichever is later in time, the commission shall file a preliminary reapportionment plan with such elections officer.

Pa. Const. art. II, § 17(c).

The publication shall also state the population of the senatorial and representative districts having the smallest

and largest population and the percentage variation of such districts from the average population for senatorial and representative districts.

Pa. Const. art. II, § 17(i).

R.I. The house of representatives shall be constituted on the basis of population and the representative districts shall be as nearly equal in population and as compact in territory as possible. The general assembly shall, after any new census taken by authority of the United States, reapportion the representation to conform to the Constitution of the state and the Constitution of the United States.

R.I. Const. art. VII, § 1.

[I]n no case shall a single state representative district have a population which varies by more than five percent (5%) from the average population of all representative districts as determined by the population reported in the federal census in 2010 . . .

2011 R.I. Pub. Laws ch. 106 § 2(c)(2).

The senate shall be constituted on the basis of population and the senatorial districts shall be as nearly equal in

> population and as compact in territory as possible. The general assembly shall, after any new census taken by authority of the United States, reapportion the representation to conform to the Constitution of the state and the Constitution of the United States.
>
> R.I. Const. art. VIII, § 1.
>
> In no case shall a single state senate district have a population which varies by more than five percent (5%) from the average population of all senate districts as determined by the population reported in the federal census in 2010 . . . .
>
> 2011 R.I. Pub. Laws ch. 106 § 2(c)(2).

S.C. The House of Representatives shall consist of one hundred and twenty-four members, to be apportioned among the several Counties according to the number of inhabitants contained in each.

S.C. Const. art. III, § 3.

In assigning Representatives to the several Counties, the General Assembly shall allow one Representative to every one hundred and twenty-fourth part of

the whole number of inhabitants in the State. . .

S.C. Const. art. III, § 4.

The Senate shall be composed of one member from each County, to be elected for the term of four years by the qualified electors in each County, in the same manner in which members of the House of Representatives are chosen.

S.C. Const. art. III, § 6.

S.D. The Legislature shall apportion its membership by dividing the state into as many single-member, legislative districts as there are state senators. House districts shall be established wholly within senatorial districts and shall be either single-member or dual-member districts as the Legislature shall determine. Legislative districts shall consist of compact, contiguous territory and shall have population as nearly equal as is practicable, based on the last preceding federal census.

S.D. Const. art. III, § 5.

Tenn. The apportionment of Senators and Representatives shall be substantially according to population. After each

decennial census made by the Bureau of Census of the United States is available the General Assembly shall establish senatorial and representative districts.

Tenn. Const. art. II, § 4.

It is the intention of the general assembly that . (2) Districts must be substantially equal in population in accordance with constitutional requirements for "one (1) person one (1) vote" as judicially interpreted to apply to state legislative districts; . . . (3) Geographic areas, boundaries and population counts used for redistricting shall be based on the 2010 federal decennial census."

Tenn. Code Ann. § 3-1-103(b).

The number of senators shall be apportioned by the General Assembly among the several counties or districts substantially according to population, and shall not exceed one-third the number of Representatives.

Tenn. Const. art. II, § 6.

Tex. The members of the House of Representatives shall be apportioned among the several counties, according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed; provided, that whenever a single county has sufficient population to be entitled to a Representative, such county shall be formed into a separate Representative District, and when two or more counties are required to make up the ratio of representation, such counties shall be contiguous to each other; and when any one county has more than sufficient population to be entitled to one or more Representatives, such Representative or Representatives shall be apportioned to such county, and for any surplus of population it may be joined in a Representative District with any other contiguous county or counties.

Tex. Const. art. III, § 26.

The State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator.

Tex. Const. art. III, § 25.

Utah

The Legislature adopts the official census population figures and maps of the Bureau of the Census of the United States Department of Commerce developed in connection with the taking of the 2010 national decennial census as the official data for establishing House district boundaries.

Utah Code Ann. § 36-1-201.5(3).

The Legislature adopts the official census population figures and maps of the Bureau of the Census of the United States Department of Commerce developed in connection with the taking of the 2010 national decennial census as the official data for establishing Senate district boundaries.

Utah Code Ann. § 36-1-101.5(3).

Vt.

In establishing representative districts, which shall afford equality of representation, the General Assembly shall seek to maintain geographical compactness and contiguity and to adhere to boundaries of counties and other existing political subdivisions.

Vt. Const. ch. II, § 13.

The house of representatives and the senate shall be reapportioned and

redistricted on the basis of population during the biennial session after the taking of each decennial census of the United States, or after a census taken for the purpose of such reapportionment under the authority of this state.

Vt. Stat. Ann. tit. 17, § 1903(a).

The standard for creating districts for the election of representatives to the general assembly shall be to form representative districts with minimum percentages of deviation from the apportionment standard for the house of representatives.

Vt. Stat. Ann. tit. 17, § 1903(b).

In establishing senatorial districts, which shall afford equality of representation, the General Assembly shall seek to maintain geographical compactness and contiguity and to adhere to boundaries of counties and other existing political subdivisions.

Vt. Const. ch. II, § 18.

Va. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the

district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011 and every ten years thereafter.

Va. Const. art. II, § 6.

Wash. Each district shall contain a population, excluding nonresident military personnel, as nearly equal as practicable to the population of any other district.

Wash. Const. art. II, § 43(5).

W. Va. After every census the delegates shall be apportioned as follows: The ratio of representation for the House of Delegates shall be ascertained by dividing the whole population of the state by the number of which the House is to consist and rejecting the fraction of a unit, if any, resulting from such division. Dividing the population of every delegate district, and of every county not included in a delegate district, by the ratio thus ascertained, there shall be assigned to each a number of delegates equal to the quotient obtained by this division, excluding the fractional remainder.

W. Va. Const. art. VI, § 7.

[Senate] districts shall be compact, formed of contiguous territory, bounded by county lines, and, as nearly as practicable, equal in population, to be ascertained by the census of the United States.

W. Va. Const. art. VI, § 4.

Wis. At its first session after each enumeration made by the authority of the United States, the legislature shall apportion and district anew the members of the senate and assembly, according to the number of inhabitants.

Wis. Const. art. IV, § 3.

This state is divided into 33 senate districts, each composed of 3 assembly districts.

Wis. Stat. § 4.001.

Wyo. Each county shall constitute a senatorial and representative district; the senate and house of representatives shall be composed of members elected by the legal voters of the counties respectively, every two (2) years. They shall be apportioned among the said counties as nearly as may

be according to the number of their inhabitants.

Wyo. Const. art. III, § 3.

No. 14-940

Supreme Court, U.S.
FILED
OCT 19 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

REPLY BRIEF FOR APPELLANTS

MEREDITH B. PARENTI
PARENTI LAW PLLC
7500 San Felipe, Suite 600
Houston, Texas 77063

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, Virginia 22201
(703) 243-9423
will@consovoymccarthy.com

Counsel for Appellants

October 19, 2015

261929

COUNSEL PRESS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS..... i

TABLE OF CITED AUTHORITIES ii

REPLY BRIEF FOR APPELLANTS 1

I. Texas Concedes The One-Person, One-Vote Rule Protects Eligible Voters But Claims Authority To Deny Them An Equal Vote.....1

II. Texas Incorrectly Contends That This Court's Decisions Allow It To Ignore Eligible Voters In The Districting Process.....8

III. Texas Inappropriately Relies On History And Tradition To Defend Its Malapportionment Of Eligible Voters 13

IV. There Are No Policy Or Practical Impediments To Protecting The Right Of Eligible Voters To An Equal Vote.....15

CONCLUSION 22

TABLE OF CITED AUTHORITIES

Page

CASES

Abrams v. Johnson,
521 U.S. 74 (1997) 6

Alabama Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) 6

Allen v. State Bd. of Elections,
393 U.S. 544 (1969) 4

Arizona v. Inter Tribal Council of Arizona, Inc.,
133 S. Ct. 2247 (2013) 17

Baker v. Carr,
369 U.S. 186 (1962) ..... *passim*

Bartlett v. Strickland,
556 U.S. 1 (2009) 19, 20

Bd. of Estimate v. Morris,
489 U.S. 688(1989) 5, 7

Brown v. Bd. of Educ. of Topeka, Kan.,
349 U.S. 294 (1955) 15

Burns v. Richardson,
384 U.S. 73 (1966) ..... *passim*

Chen v. City of Houston,
121 S. Ct. 2020 (2001) 2, 9, 11

Cited Authorities

Page

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2000) 9, 15, 16

City of Boerne v. Flores,
521 U.S. 507 (1997).....6

City of Mobile, Ala. v. Bolden,
446 U.S. 55 (1980).....4

Colegrove v. Green,
328 U.S. 549 (1946).....3, 7

Gaffney v. Cummings,
412 U.S. 735 (1973).....2, 11, 12

Garza v. Cnty. of Los Angeles,
918 F.2d 763 (9th Cir. 1990).....5, 12

Georgia v. Ashcroft,
539 U.S. 461 (2003).....21

Hadley v.
Junior Coll. Dist. of Metro. Kansas City, Mo.,
397 U.S. 50 (1970).....1, 9

Johnson v. DeGrandy,
512 U.S. 997 (1994).....6

Karcher v. Daggett,
462 U.S. 725 (1983).....13, 21

Page

LULAC v. Perry,
548 U.S. 423 (2006) 20

Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle,
429 U.S. 274 (1977) 11

Perkins v. Matthews,
400 U.S. 379 (1971) 6

Reynolds v. Sims,
377 U.S. 533 (1964) ..... *passim*

Ricci v. DeStefeno,
557 U.S. 557 (2009) 6-7

Shaw v. Reno,
509 U.S. 630 (1993) 16

Tennant v. Jefferson Cnty. Comm'n,
133 S. Ct. 3 (2012) 19

Vieth v. Jubelirer,
541 U.S. 267 (2004) 16, 21

Wesberry v. Sanders,
376 U.S. 1 (1964) 10

STATUTES AND OTHER AUTHORITIES

U.S. Const. amend. XIV, § 2 ..... 13, 14

Cited Authorities

Page

U.S. Const. art. I, § 2, cl. 3 14

John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 Yale L.J. 163 (1984) 15

Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213 (1991) 5

Sanford Levinson, *The Warren Court Has Left the Building*, 2002 U. Chi. Legal F. 119 (2002) 5

U.S. Census Bureau, ACS Custom Tables (2015) 20

U.S. Dep't of Commerce Economics & Statistics Admin., *The Value of the American Community Survey: Smart Government, Competitive Business, and Informed Citizens* (April 2015) 20

REPLY BRIEF FOR APPELLANTS

I. Texas Concedes The One-Person, One-Vote Rule Protects Eligible Voters But Claims Authority To Deny Them An Equal Vote.

This appeal presents the Court with a fundamental question: does the Fourteenth Amendment's one-person, one-vote rule protect eligible voters? The answer must be yes. "[A]n individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Thus, the one-person, one-vote rule affords all eligible voters an equally weighted vote regardless of where they reside. Brief for Appellants ("Br.") 19-29. It is inconceivable that a constitutional rule designed "to insure that each person's vote counts as much, insofar as it is practicable, as any other person's," affords literally *no* protection against vote dilution. *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 54 (1970).

Texas concedes this critical point. Texas agrees that "vote-weighting is prohibited" and "malapportioned state legislative districts" that are the "functional equivalent of weighted votes" violate the one-person, one-vote rule. Brief for Appellees ("Tex.") 14. Were it otherwise, "an individual's vote could have different proportional strength depending on the number of other voters in a district." *Id.* (citing *Reynolds*, 377 U.S. at 568). This concession should be decisive. If the one-person, one-vote rule protects eligible voters to any reasonable degree, Plan S172 is unconstitutional. Br. 49.

Yet Texas disclaims any obligation to draw districts actually protecting eligible voters. Texas contends that it may grossly malapportion districts, as it did here, because a State violates the one-person, one-vote rule only by engaging in "invidious vote dilution" and a "State does not engage in invidious vote dilution when it substantially equalizes a reliable measure of total, citizen, or voting-eligible population." Tex. 18. Texas's attempt to divorce the one-person, one-vote rule from "invidious vote dilution" is untenable.

In this case, the Court must determine the "relevant 'population' that States and localities must equally distribute among their districts." *Chen v. City of Houston*, 121 S. Ct. 2020, 2021 (2001) (Thomas, J., dissenting from denial of certiorari). But failing to distribute that "relevant 'population'" equally *is* invidious discrimination. *Reynolds*, 377 U.S. at 561-63. After all, the point of the "10% deviation" framework is to root out equal-protection violations. Br. 46-49. Deviations exceeding 10% "make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973).

Appellants thus can prevail in their one-person, one-vote challenge without any further showing of invidious discrimination. If the Fourteenth Amendment requires States to equalize eligible voters across districts, then Texas's adoption of a Senate plan with massive deviations is prima facie invidious discrimination. Texas can no more defend Plan S172 by claiming it did not "intend" to engage in vote dilution than Alabama could have argued in *Reynolds* that, although each county received one Senator, it did not "intentionally dilute" votes of eligible

voters in overpopulated counties. Tex. 50. Nothing could be more "arbitrary, irrational, or invidious," *id.*, than systematically ignoring voter equality when the Constitution requires Texas to consider it. *Colegrove v. Green*, 328 U.S. 549, 569 (1946) (Black, J., dissenting) ("[S]uch a gross inequality in the voting power of citizens irrefutably demonstrates a complete lack of effort to make an equitable apportionment.").

Texas does not seriously contend otherwise. It does not suggest, for example, that Appellants must allege facts beyond showing a "population" deviation exceeding 10% to state a one-person, one-vote claim. Instead, Texas argues that a State invidiously discriminates only if it does not "sufficiently equalize *any* population base." Tex. 17. Thus, although Texas goes to great lengths to situate the one-person, one-vote rule within the broader equal-protection framework, its defense of Plan S172 rests on the same theory it has all along: that *Burns v. Richardson*, 384 U.S. 73 (1966), grants States absolute discretion to choose any measure of "population."

But Texas not only misreads *Burns*, *infra* 8-10, its position is self-contradictory. While agreeing that the one-person, one-vote rule protects against vote dilution, Texas proposes a legal standard that does not protect against it. And, Texas admits that the "10% deviation threshold ... reflects the fundamental nature of the right to vote" yet asserts that "equalization of total population among districts generally satisfies the Equal Protection Clause" even when, as here, it causes gross malapportionment of eligible voters. Tex. 25-26. *Reynolds* protects eligible voters or it does not. Texas cannot sidestep this issue by nakedly asserting that the "apportionment goal of [total]

population equality is not in tension with the goal of voting equality," *id.* 34, when Plan S172 proves that pursuing total population at all costs impairs the rights of eligible voters.

The United States, on the other hand, makes its position clear: the one-person, one-vote rule affords eligible voters *no* protection. Whether "districts contain unequal numbers of eligible voters" has no relevance; all that matters is that "state legislative districts ... equalize total population." United States Amicus Brief ("U.S.") 5. That is a remarkable assertion. *Reynolds* is *the* landmark vote-dilution decision. It "established that the Equal Protection Clause guarantees the right of each voter to 'have his vote weighted equally with those of all other citizens.'" *City of Mobile, Ala. v. Bolden*, 446 U.S. 55, 77-78 (1980) (quoting *Reynolds*, 377 U.S. at 576); *id.* at 116 (Brennan, J., dissenting) ("The equal protection problem attacked by the 'one person, one vote' principle is ... one of vote dilution."). The concept of "vote dilution" would not exist without *Reynolds*. *Allen v. State Bd. of Elections*, 393 U.S. 544, 588 (1969) (Harlan, J., concurring in part and dissenting in part).

The United States argues "such language should not be understood to mean that the Equal Protection Clause requires States to equalize the number of voters across districts." U.S. 13. But that is the *only* thing it can mean. A challenge to "apportionment ... on the ground that the right to vote of certain citizens was effectively impaired since debased and diluted" is "justiciable" only because the Equal Protection Clause protects eligible voters. *Reynolds*, 377 U.S. at 556-57. "[O]ne person's vote must be counted equally with those of all other voters

in a State," *id.* at 560, because of the principle of equal voting power. And, "[i]n calculating the deviation among districts, the relevant inquiry is whether 'the vote of any citizen is approximately equal in weight to that of any other citizen,'" *Bd. of Estimate v. Morris*, 489 U.S. 688, 701 (1989) (quoting *Reynolds*, 377 U.S. at 579), precisely because the Equal Protection Clause "requires States to equalize the number of voters across districts," U.S. 13.[1] This effort to recast the one-person, one-vote rule as affording no protection to eligible voters must fail. There is no way to interpret *Reynolds* other than adopting the "principle of electoral equality." *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part).

---

1. The contention that *Reynolds* would not have keyed the one-person, one-vote rule to eligible voters at a time of rampant minority disenfranchisement, U.S. 16, misunderstands the historical context. Numerous stratagems were being used to deny or debase minority voting rights. The one-person, one-vote rule never was meant to be (nor could have been) a cure-all. The Court understood the need to affirm that the Constitution protects all voters and separately to address racially discriminatory voting laws. Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 Mich. L. Rev. 213, 262 (1991) ("Having committed itself to safeguarding equality in voting weights, the Court next set about defining constitutional boundaries for the political community, ... progressively narrow[ing] the permissible grounds of exclusion from political participation."); Sanford Levinson, *The Warren Court Has Left the Building*, 2002 U. Chi. Legal F. 119, 122-23 & n.18 (2002) ("Chief Justice Warren ... suggested that ... '[m]any of our problems would have been solved a long time ago if everyone had the right to vote and his vote counted the same as everybody else's.'").

Indeed, interpreting *Reynolds* that way would mean the Voting Rights Act of 1965 ("VRA") could not protect against minority vote dilution. The VRA is constitutional only to the extent it enforces the Reconstruction Amendments. *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).[2] In granting minority voters special vote-dilution protection, "Congress intended to adopt the concept of voting articulated in *Reynolds*" and, in turn, protect African Americans "against a dilution of their voting power." *Perkins v. Matthews*, 400 U.S. 379, 390 (1971). The claim that the "Equal Protection Clause and Section 2 of the [VRA] protect distinct interests," U.S. 24, not only is incorrect, then, it highlights a key defect in the United States' position. If the Fourteenth Amendment does not prohibit vote dilution, a federal law targeting redistricting practices that "dilute minority voting strength" could not be valid enforcement legislation. *Johnson v. DeGrandy*, 512 U.S. 997, 1018 (1994).

Affording vote-dilution protection only to minorities, moreover, would be independently problematic under the Equal Protection Clause. The Court has shown concern when statutory rights and the foundational constitutional principles they purport to enforce are moving in "different directions" and has recognized the need "to reconcile them" if possible. *Ricci v. DeStefano*, 557 U.S. 557, 580

---

2. The argument that Section 2 enforcement takes precedence over the one-person, one-vote rights of eligible voters, U.S. Br. 32-35, thus is mistaken. The one-person, one-vote rule is a "background" constitutional principle against which Section 2 operates. *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015). Statutes, including the VRA, yield to the Constitution; not the other way around. *Abrams v. Johnson*, 521 U.S. 74, 98-101 (1997).

(2009). It is one thing for Congress to afford minorities greater vote-dilution protection. It is quite another to read the Equal Protection Clause to extend vote-dilution protection only to minorities. Yet that is the consequence of reading *Reynolds* to afford no protection to eligible voters.

The United States further argues that, legal merits aside, Appellants should not prevail because they can still "elect a representative who represents the same number of constituents as all other representatives." U.S. 5. But this ignores the multiple harms vote dilution causes. Eligible voters have a constitutional interest "in maintaining the effectiveness of their votes," *Baker v. Carr*, 369 U.S. 186, 208 (1962), and the effect of Plan S172 "will be that certain citizens, and among them [Appellants], will in some instances have votes only one-[half] as effective in choosing [state senators] as the votes of other citizens." *Colegrove*, 328 U.S. at 569 (Black, J., dissenting). Texas's grossly malapportioned Senate also means fewer representatives from Appellants' region of the State, which in turn means the legislative process will be distorted to their detriment. *Morris*, 489 U.S. at 693-94. In other words, Appellants will suffer the very harms that led the Court to intervene in the first place. Br. 19-26.

It is also wrong to suggest that the rule Appellants advocate uniquely benefits rural voters. Ensuring equal voting power remedies the injury African-American voters in urban areas with large concentrations of non-voters suffer in local districting. Project 21 Amicus Brief 19-33. And it also protects minority voters when the counting of prisons, which are often located in rural areas, "unfairly dilute[s] minority voting strength and create[s] an unfair voting advantage for white voters." Motion for

Summary Judgment at 5, *Calvin v. Jefferson County Bd. of Comm'rs*, No. 4:15-cv-00131-MW-CAS (N.D. Fla. Sept. 18, 2015).[3] In short, the failure to ensure electoral equality causes harm to eligible voters from all racial, ethnic, and geographic backgrounds.

Ultimately, Texas and the United States have so much trouble explaining how the Equal Protection Clause can prohibit vote dilution and simultaneously sustain Plan S172 because there is no explanation. If *Reynolds* affords any protection to eligible voters, Appellants have stated a claim. If *Reynolds* does not, States are free to dilute the votes of eligible voters with impunity. Such a ruling would mean that the district court correctly dismissed this suit. But it would have profound ramifications for the VRA and voting rights more broadly.

II. Texas Incorrectly Contends That This Court's Decisions Allow It To Ignore Eligible Voters In The Districting Process.

Despite wide recognition that this issue has never been resolved, Texas and its *amici* argue otherwise. Texas reads *Burns* to hold that its "decision to include voting-ineligible populations in the apportionment base is ... a choice 'about the nature of representation' that the Equal Protection Clause leaves to the States." Tex. 20 (quoting *Burns*, 384 U.S. at 91-92). But, unlike Texas, Hawaii did not include "voting-ineligible populations," *id.*, to the

---

3. The ACLU, which brought *Calvin* and similar cases, never explains in its amicus brief how those lawsuits, which are predicated on the same vote-dilution claim as Appellants bring, can be reconciled with the position it takes here.

detriment of eligible voters. Hawaii *excluded* non-voters from its apportionment base to ensure that eligible voters in districts with military bases did not have "substantially greater voting power than the electors of districts not including such bases." *Burns*, 384 U.S. at 94 n.24. Because Hawaii's "choice" was not "one the Constitution forbids," the Court had been "shown no constitutionally founded reason to interfere." *Id.* at 92.

To be sure, there is a dispute over which "population" Hawaii sought to equalize by a using a registered-voters apportionment base. Br. 35; Tex. 21-22; U.S. 30-31. But there is no dispute that the Court accepted Hawaii's choice only after closely examining it and concluding that it fully protected eligible voters. *Burns*, 384 U.S. at 96. The Court had no occasion to decide the question raised here, *Hadley*, 397 U.S. at 58 n.9, and no case since has placed it before the Court, *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from denial of certiorari).

Texas also cannot square its reading of *Burns* with *Baker*. Br. 19-21. Texas previously claimed that its choice of a population base might actually be a political question. Appellees' Motion to Dismiss 22-23. But having abandoned that argument, Tex. 15 n.3, Texas must awkwardly argue that although the "political-question doctrine does not divest the Court of jurisdiction to adjudicate plaintiffs' claim," this suit was properly dismissed because "'this eminently political question has been left to the political process,'" *id.* (quoting *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000)). Texas must explain to the Court how a political-question rationale survives *Baker* or how allowing Texas to choose which population to equalize—irrespective of that choice's harm to eligible voters—does

not overrule *Baker sub silentio*. To this juncture, Texas has done neither.

The United States acknowledges that *Burns* did not decide this question. U.S. 30-31. The United States instead claims that *Wesberry v. Sanders*, 376 U.S. 1 (1964), held that "congressional districts must be drawn on the basis of total population," U.S. 13, and, as a result, that state and local districts may be drawn on that basis too, *id.* 20. But the premise is flawed. *Wesberry* was no less concerned than *Reynolds* with the rights of eligible voters. Br. 23-24. In fact, *Wesberry* held that the "population disparities deprived [plaintiffs] and voters similarly situated of a right under the Federal Constitution to have their votes for Congressmen given the same weight as the votes of other Georgians." 376 U.S. at 2-3.

That is not to suggest *Wesberry* resolved the issue in favor of voter equality at the congressional level.[4] But it certainly did not hold the opposite. Had *Wesberry* decided the issue, *Reynolds* would have needed to discuss it. But *Reynolds* understood *Wesberry* to hold that "one person's vote must be counted equally with those of all other voters in a State." 377 U.S. at 560. *Burns* would have extensively discussed that holding as well given the Court's decision to permit Hawaii to draw state districts based on registered voters. But *Burns* does not even mention *Wesberry*. The United States cannot reverse-engineer an answer to the question here through *Wesberry*.

---

4. The Court need not resolve that question here. Appellants do not challenge a congressional map, and congressional and state-level districting, while not "wholly inapposite," are "based on different constitutional considerations and [are] addressed to rather distinct problems." *Reynolds*, 377 U.S. at 560.

The remaining cases on which Texas and the United States rely are similarly inapposite. Tex. 29-31; U.S. 10. That these cases used the word "population" to refer to the apportionment base the State must equalize and relied on total population figures to evaluate the districts at issue does not bring the Court closer to resolving the question presented. *Chen*, 121 S. Ct. at 2021 (Thomas, J., dissenting from the denial of certiorari). No court to review this issue believes that any of these cases squarely confronted it. Appellants' Jurisdictional Statement 13-16. Texas claims that if voter equality were required, the Court "would have had no choice but to require proof that the total population approximated the voter population." Tex. 32-33. But as Texas now acknowledges, Tex. 15 n.3, this issue "is not of the jurisdictional sort which the Court raises on its own motion." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279 (1977). If the plans at issue in those cases malapportioned eligible voters, the parties needed to raise the issue. They did not.

Texas and the United States can point to no case in which a discrepancy between total and voter population was obviously present and the Court overlooked it. The contention that *Gaffney* is one such case is wrong. Tex. 27-28; U.S. 11. They point to the statement that "States have congressional districts that vary from one another by as much as 29% and as little as 1% with respect to their age-eligible voters." *Gaffney*, 412 U.S. at 747. But the Court was not resolving the issue here. As an initial matter, while the statement highlighted voter discrepancies in congressional districts, *Gaffney* was a challenge to Connecticut's *state* redistricting map. 412 U.S. at 735-36. Moreover, the gross congressional deviations the Court referenced in *Gaffney* were in California and New

York—not Connecticut. *Id.* at 747 n.13. The "congressional districts in Connecticut . . . var[ied] from one another" only "by as much as 4% in their age-eligible voters." *Id.* at 747.

If anything, the Court's focus on the "body of voters whose votes must be counted and weighed for the purposes of reapportionment," *id.* at 746, shows that its overriding concern was protecting the rights of eligible voters. The Court emphasized that "total population ... is not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan." *Id. Gaffney* thus supports the understanding that total population is only "a proxy for equalizing the voting strength of eligible voters." *Garza*, 918 F.2d at 783 (Kozinski, J., concurring and dissenting in part). Because there was no contention that Connecticut's use of total population as an apportionment base was an insufficient proxy, the issue raised here was not presented in *Gaffney*.

Last, while asking the Court not to reach the issue, the United States strongly implies that *Garza* is correct and that districts must be based exclusively on total population. U.S. 27-32. But, as Judge Kozinski understood, the Court cannot answer the question presented in the affirmative without reaching this issue. Moreover, whether non-voters have a constitutional right to undiluted access is not a tough question. The theory cannot be reconciled with *Burns* and no decision holds that non-voters hold such a right under the Equal Protection Clause or First Amendment. Br. 16-17; Tex. 47. Endorsing the *Garza* rationale also would mean that non-voters have Article III standing to bring a one-person, one-vote claim, U.S. Br. 15 n.5, or that diluted-access claims are judicially cognizable under the Guarantee Clause, ACLU Amicus Brief ("ACLU") 4. Neither proposition is tenable.

III. Texas Inappropriately Relies On History And Tradition To Defend Its Malapportionment Of Eligible Voters.

Texas and its *amici* seek support for the use of total population in the Constitution's text and history. The requirement to apportion congressional seats among the States "based on 'the whole number of persons in each State,'" in their view, means "the framers of the Fourteenth Amendment accepted total-population equality as a permissible method of apportionment." Tex. 39 (quoting U.S. Const. amend. XIV, § 2). The argument is misplaced for several reasons.

Foremost, this argument boils down to an assertion that "the general phrase 'equal protection' in Section 1" should not impose a command not anchored in Section 2 of the Fourteenth Amendment. Tex. 40; U.S. 20; ACLU 24-25. The problem is that the *Reynolds* dissent leveled the same charge, 377 U.S. at 594-608 (Harlan, J., dissenting), but was rebuffed, Br. 42-43. The Court understood that neither Article I nor Section 2 of the Fourteenth Amendment placed any "restriction whatsoever on the power of any State to define the group of persons within the State who may vote for particular candidates." *Karcher v. Daggett*, 462 U.S. 725, 745 (1983) (Stevens, J., concurring). Like it or not, *Reynolds* determined that such restrictions followed from the rights eligible voters hold under the Equal Protection Clause.

In any event, the total-population approach Texas and other States use does not approximate the apportionment model they claim to emulate. The Constitution requires that "each State shall have at least one Representative."

U.S. Const. art. I, § 2, cl. 3. If that system were used to allocate seats within States, each county could be granted at least one seat with the rest being distributed based on total population. Br. 43. Yet *Reynolds* rejected this very proposal. 377 U.S. at 571-77. The United States wrongly claims that *Reynolds* only rejected a plan modeled on the United States Senate. U.S. 10. The Court rejected a proposal that would have given "each of the 67 counties at least one" representative in the Alabama House, "with the remaining 39 seats being allotted among the more populous counties on a population basis." *Reynolds*, 377 U.S. at 571. The federal analogy fails for this reason alone.

Furthermore, the Constitution has never allocated seats solely based on total population. The Constitution required congressional seats to be apportioned based on the "whole Number of free Persons" but counting only "three fifths of all other Persons." U.S. Const. art. I, § 2, cl. 3. The Fourteenth Amendment altered that system, which had accounted for the deplorable institution of slavery, by requiring seats to be apportioned "counting the whole number of persons in each State" but reducing a State's proportional share "when the right to vote ... is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime." *Id.* amend. XIV, § 2.

There is no doubt that the Fourteenth Amendment's apportionment system arose from unique historical conditions. Cato and Reason Foundation Amicus Brief 4-33. That is why it has little or no relevance to intrastate districting. Br. 42-44. But if federal apportionment offers any guidance, it is "that egregious departures from the

principle of *electoral* equality—the disenfranchisement of adult male 'citizens'—would be penalized." *Chen*, 206 F.3d at 527; Tex. 40-41. At most, then, the constitutional text and history suggest that analogizing to the federal scheme would require States to similarly balance *both* total and voter population.

Last, Texas and its *amici* argue that States should be allowed to use total population because of tradition. Tex. 28; U.S. 11-12. But ensuring voter equality will not uproot most States' practices. *See infra* 15-16. Regardless, a traditional state policy must yield when it violates the Constitution. *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955); ACLU 24. *Reynolds* "required most states to amend their constitutions and virtually every state to reapportion." John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 Yale L.J. 163, 184 n.96 (1984). If tradition controlled, States would be allowed to draw districts on a geographic basis. *Baker*, 369 U.S. at 321 (Harlan, J., dissenting).

IV. There Are No Policy Or Practical Impediments To Protecting The Right Of Eligible Voters To An Equal Vote.

In a final effort to deny Appellants their equal-protection rights, Texas and its *amici* raise a host of policy and practical objections. None of the arguments has merit. At a general level, they argue that granting relief here will cause upheaval. Tex. 28; U.S. 11-12. That misunderstands the nature of the injury and what is required to remedy it. "It is the distribution of legislators rather than the method of distributing legislators that must satisfy the demands of the Equal Protection Clause." *Burns*, 384 U.S. at 77 n.4.

In most States, "eligible voters will frequently track the total population evenly." *Chen*, 206 F.3d at 525. Nothing will change in those States.

Protecting eligible voters also will not impair any interest in representational equality. Tex. 57; U.S. 27-28. Texas's *amici* assume that Appellants ask the Court to disregard nonvoters. But nothing could be further from the truth. Texas, for example, had a range of available options that could have largely reconciled both interests. Br. 46. It ignored them either because it believed they were not permitted, Tex. 23 n.7, or because it had no interest in protecting voter equality. Indeed, Texas does not dispute that it made no attempt to equalize both total and voter population. *Id.* 50.

In any event, the real objection is not that roughly equalizing eligible voters will make it harder to protect representational interests; it is that doing so will inhibit the racial and political gerrymandering that has come to dominate the redistricting process. U.S. 32-35. If States must equalize total population and voter population, in addition to considering "traditional districting principles such as compactness, contiguity, and respect for political subdivisions," *Shaw v. Reno*, 509 U.S. 630, 646-47 (1993), they will have far less opportunity to gerrymander. Districts, in turn, will become more integrated and less politically cohesive. Protecting the one-person, one-vote rights of eligible voters therefore will not only enforce the Equal Protection Clause, it will curb redistricting practices that the Court has found problematic—but without judicial intervention. *Vieth v. Jubelirer*, 541 U.S. 267, 306-17 (2004) (Kennedy, J., concurring in the judgment). Protecting eligible voters, in other words, will

not further "mire the Judiciary in ... the apportionment process." Tex. 54. It will have the opposite effect.

Various *amici* also argue that protecting eligible voters is bad policy because it "sends the harmful message that [ineligible voters] do not matter." City of New York Amicus Brief 9; State of New York, *et al.* Amicus Brief 36-38. This is the height of hypocrisy. States control voter qualifications, *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2257-58 (2013), and it is the States that have disenfranchised non-citizens, felons, and other categories of non-voters, U.S. 27-28; City of Los Angeles, *et al.* Amicus Brief 33-34. Still they complain it is Appellants who seek to deny these non-voters a representative voice. If States sincerely want these residents to have a stake in elections, they should let them vote. But the Court should not permit States to negate the equal-protection rights of eligible voters based on the "message" it would send to constituents the States have disenfranchised.

Moreover, this argument ignores the message that ruling against Appellants will send to rural America. The one-person, one-vote rule was mainly a response to State districting policies that denied equal voting power to those living in urban areas. *Reynolds*, 377 U.S. at 543 n.7. But the Court understood that "[c]onceivably, in some future time, urban areas might ... be in a situation of attempting to acquire or retain legislative representation in excess of that to which, on a population basis, they are entitled." *Id.* at 568 n.43. That situation has arisen. Tennessee Legislators Amicus Brief 12-17. Rural voters thus ask the Court to honor its promise to vigilantly enforce the one-person, one-vote rule regardless of who it might benefit or burden. Abandoning voter equality now that the equities

run the other way would send a terrible message to rural Americans about their place in society.

Practical objections to ensuring equality for eligible voters are no stronger. The principal objection is that there is inadequate data to draw eligible-voter-based districts. U.S. 22-24. As an initial matter, the argument lacks relevance here because the data is more than adequate to address Plan S172's gross deviations. The tables on which Appellants rely were produced by the Texas Legislative Council and have been used many times to draw Texas districts. The legislature relied on these statistics to draw the 2010 congressional and state maps, the federal courts that heard VRA challenges to those maps relied on them (at the request of Texas and several of its *amici*), and the legislature relied on it again to enact Plan S172. Br. 4-9. Most importantly, Texas agrees it "could reasonably decide to equalize the CVAP population in its legislative districts and deem the existing ACS data from the Census Bureau sufficiently reliable." Tex. 53. No party here has (or could) object to the statistical tables upon which Appellants rely in their complaint.

The assumption that States would have to rely exclusively on ACS data going forward is wrong too. States could still rely primarily on the Census and augment it with voting-based data only when needed to address large deviations of eligible voters. That may include ACS data, but it may also include a State's own data on eligible voters, as well as "citizenship and voting-age citizenship" data it has developed "for use in redistricting." *Id.* 54. Many States, including Texas, gather additional data to better draw state and local districts. Br. 4-5. There is no reason why States could not supplement the ACS data for this purpose too.

Texas's *amici* claim that using ACS data (especially in small districts) is problematic because of purportedly large margins of error. But demographers—those expert in drawing districts—disagree. Demographers Amicus Brief ("Demographers") 23-27. In any event, the margin of error is immaterial here given the massive deviations in Plan S172. Supplemental Appendix 4-9. No one disputes that Plan S172's deviation of eligible voters far exceeds 10%. Indeed, the complaint listed a "variety of voter-population metrics" not to make Texas choose which one "would be constitutionally acceptable," Tex. 55, but to show that Plan S172 malapportioned eligible voters under *every* metric. The "margin of error" argument is meant to distract from the important issue confronting the Court.

In future cases, moreover, "the parties challenging the plan bear the burden of proving the existence of population differences that could practicably be avoided." *Tennant v. Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 5 (2012). In cases like this one, challengers will have little difficulty carrying their legal burden. Demographers 25-26. Where the deviations are not so pronounced, it will be up to the challengers to show that the available data proves that using total population is insufficient to protect the rights of eligible voters. If the challengers cannot do so, they will not state a claim.

Regardless, criticism of the ACS data is misplaced. It is the same data used extensively in VRA litigation. One of the "necessary preconditions" for bringing a Section 2 vote-dilution claim is showing that the minority group is "sufficiently large and geographically compact to constitute a majority" of the district. *Bartlett v. Strickland*, 556 U.S. 1, 11 (2009). That means the minority group must make up

at least 50.1% of the eligible voters in the district. *Id.* at 12-20. Plaintiffs, States, and DOJ all rely on the ACS data to determine whether that critical showing has been made. Demographers 15-17. This Court thus relies on the ACS data in Section 2 cases, *LULAC v. Perry*, 548 U.S. 423-25, 427-29, 436-42 (2006) (Kennedy, J.); *id.* at 502-10 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part); *Bartlett*, 556 U.S. at 26-28, 36-40 (Souter, J., dissenting), as does every circuit without exception, Demographers 17-18 (collecting cases). None of the *amici* can explain why ACS data is somehow reliable enough to enforce Section 2 but inadequate to enforce the one-person, one-vote rule. The data must be adequate for both purposes or for neither.

The ACS data is used for numerous other purposes too. DOJ used it to enforce Section 5 of the VRA, Congress made it the benchmark for determining which jurisdictions are subject to Section 203 of the VRA, federal agencies use it to fulfill statutory duties, and redistricting commissions and demographers use it routinely. Demographers 10-12, 19-23. The Census Bureau even prepares a "Citizen Voting Age Population (CVAP) Special tabulations" for DOJ to use in fulfilling its redistricting duties. *Id.* 14. The Bureau can also prepare special tabulations and support State initiatives to use Census Data for redistricting. *Id.* 14; U.S. Census Bureau, ACS Custom Tables, www.census.gov/programs-surveys/acs/data/custom-tables.html. ACS data "'affords comprehensive coverage of the Nation and permits statistically reliable estimation for small and large geographic areas.'" *Id.* 7 (quoting U.S. Dep't of Commerce Economics & Statistics Admin., *The Value of the American Community Survey: Smart Government, Competitive Business, and Informed Citizens* 5 (April 2015)).

That ACS CVAP data is an "estimate" does not alter the analysis. U.S. 22. The Court has never demanded perfection in districting. The decennial Census is often a "legal fiction" in redistricting litigation given the shifts and changes in a population over 10 years. *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003). Indeed, based on timeliness, the 2010 Census population data used to draw Plan S172 in 2013 was *less* accurate than the comparable ACS data, which includes time periods closer to when the map was drawn.

The issue is merely whether the data is "sufficient for decisionmaking." *Karcher*, 462 U.S. at 738. At one time, decennial Census data may have been "the only basis for good-faith attempts to achieve population equality." *Id.* But that is no longer true. The combination of ACS data and modern districting tools allows States to protect the rights of eligible voters. *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). Texas has the eligible-voter data needed to remedy the gross malapportionment challenged here.

Finally, those *amici* claiming that the States do not have adequate data fail to appreciate the consequences of their argument. They appear to believe that the argument is a vehicle for retaining the prevailing regime. But they confuse rights and remedies. Whether the one-person, one-vote rule protects the right to electoral equality does not turn on the availability of data sufficient to enforce that right. The inability of States to obtain data needed to remedy their injury would instead mean that there are no longer "judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." *Baker*, 369 U.S. at 223. Lack of a remedy because of insufficient data, in other words, would mean redistricting is once again a political question.

* * *

In 1972, Texas argued to this Court that "the bedrock assumption of the apportionment cases [is] that dilution of the *vote* is the thing protected against .... A shift from the vote-dilution rationale to any other rationale would not be a minor alteration but a diastrophic change, a repudiation of the whole theory of the apportionment cases from *Baker v. Carr* forward." Brief for Appellants at 33, *Bullock v. Weiser*, No. 71-1623 (Dec. 1972). Texas was right then and it is wrong now. If the Court believes that recognizing vote dilution as an equal-protection harm was a mistake, *Reynolds* should be overruled. But if the Court chooses to retain *Reynolds*, the district court's decision cannot be upheld. If the Equal Protection Clause prohibits vote dilution, Appellants have stated a one-person, one-vote claim.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

MEREDITH B. PARENTI
PARENTI LAW PLLC
7500 San Felipe, Suite 600
Houston, Texas 77063

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
J. MICHAEL CONNOLLY
CONSOVOY MCCARTHY PARK PLLC
3033 Wilson Boulevard, Suite 700
Arlington, Virginia 22201
(703) 243-9423
will@consovoymccarthy.com

Counsel for Appellants

No. 14-940

In the Supreme Court of the United States

SUE EVENWEL, ET AL., APPELLANTS

v.

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
VANITA GUPTA
Principal Deputy Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General
MARK L. GROSS
ERIN ASLAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Equal Protection Clause of the Fourteenth Amendment requires the State of Texas to equalize "eligible voters" rather than total population when creating state legislative districts.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 5
Argument 8
The Equal Protection Clause does not require the states to equalize "eligible voters" rather than total population when creating state legislative districts 8
A. Equalizing total population across state legislative districts satisfies the Equal Protection Clause 9
1. The Court has consistently evaluated redistricting plans for compliance with the Equal Protection Clause by examining equality of total population 10
2. The principle of equality of representation is embodied in the Constitution 17
3. Data on total population collected through the federal census are the most precise data for use in redistricting 22
4. The Voting Rights Act does not suggest that reliance on voter population should be required 24
B. This Court should decline to address Texas's argument that States are not required to equalize total population 26
1. Texas's position is not the subject of full adversarial presentation 26
2. There are at the very least reasons to doubt the correctness of Texas's position 27
3. States cannot draw legislative districts that attempt to equalize eligible voters if the resulting plan violates the Voting Rights Act 32

Table of Contents—Continued: Page

C. The district court correctly dismissed appellants' complaint 35
Conclusion....36

TABLE OF AUTHORITIES

Cases:

Abate v. *Mundt*, 403 U.S. 182 (1971)....10, 29
Alabama Legis. Black Caucus v. *Alabama*, 135 S. Ct. 1257 (2015)....24
Avery v. *Midland Cnty.*, 390 U.S. 474 (1968)....10, 15
Baker v. *Carr*, 369 U.S. 186 (1962)....1
Bartlett v. *Strickland*, 556 U.S. 1 (2009)....24
Board of Estimate of New York v. *Morris*, 489 U.S. 688 (1989)....10, 14
Brown v. *Thomson*, 462 U.S. 835 (1983)....9, 11, 13, 29, 35
Burns v. *Richardson*, 384 U.S. 73 (1966)....*passim*
Chapman v. *Meier*, 420 U.S. 1 (1975)....2, 10
Chen v. *City of Hous.*, 206 F.3d 502 (5th Cir. 2000), cert. denied, 532 U.S. 1046 (2001)....9
City & Cnty. of San Fransisco v. *Sheehan*, 135 S. Ct. 1765 (2015)....26
Connor v. *Finch*, 431 U.S. 407 (1977)....2, 11, 29, 30
Daly v. *Hunt*, 93 F.3d 1212 (4th Cir. 1996)....10
Davis v. *Bandemer*, 478 U.S. 109 (1986)....27
Ely v. *Klahr*, 403 U.S. 108 (1971)....23
Federation for Am. Immigration Reform v. *Klutznick*, 486 F. Supp. 564 (D.D.C.), appeal dismissed, 447 U.S. 916 (1980)....19, 22
Fortson v. *Dorsey*, 379 U.S. 433 (1965)....32
Gaffney v. *Cummings*, 412 U.S. 735 (1973)....2, 8, 11, 12, 29

Cases—Continued: Page

Garza v. *County of L.A.*, 918 F.2d 763 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991) 10, 25, 27
Gomillion v. *Lightfoot*, 364 U.S. 339 (1960) 2, 16
Gray v. *Sanders*, 372 U.S. 368 (1963) 21
Griffiths, In re, 413 U.S. 717 (1973) 28
Growe v. *Emison*, 507 U.S. 25 (1993) 2
Hadley v. *Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50 (1970) 13, 15
Johnson v. *De Grandy*, 512 U.S. 997 (1994) 35
Karcher v. *Daggett*, 462 U.S. 725 (1983) 8, 27, 29
Kirkpatrick v. *Preisler*, 394 U.S. 526 (1969) 13, 14
Kostik v. *Nago*, 960 F. Supp. 2d 1074 (D. Haw. 2013), aff'd, 134 S. Ct. 1001 (2014) 31
Larios v. *Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), aff'd, 542 U.S. 947 (2004) 9
League of United Latin Am. Citizens v. *Perry*, 548 U.S. 399 (2006) 24
Lepak v. *City of Irving*, 453 Fed. Appx. 522 (5th Cir. 2011) 25
Loeber v. *Spargo*, 391 Fed. Appx. 55 (2d Cir. 2010), cert. denied, 131 S. Ct. 2934 (2011) 9
Mahan v. *Howell*, 410 U.S. 315 (1973) 8, 10, 20, 29
Miller v. *Johnson*, 515 U.S. 900 (1995) 2, 15
Minor v. *Happersett*, 88 U.S. (21 Wall.) 162 (1875) 19
Montes v. *City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014) 25
Morse v. *Republican Party of Va.*, 517 U.S. 186 (1996) 17
1983 Legislative Apportionment of House, Senate, and Congressional Districts, In re, 469 A.2d 819 (Me. 1983) 12

Cases—Continued: Page

Plyler v. *Doe*, 457 U.S. 202 (1982) 28
Pope v. *County of Albany*, No. 11-CV-0736, 2014 WL 316703 (N.D.N.Y. Jan. 28, 2014) 23
Reynolds v. *Sims*, 377 U.S. 533 (1964) ..... *passim*
Shaw v. *Reno*, 509 U.S. 630 (1993) 27
South Carolina v. *Katzenbach*, 383 U.S. 301 (1966) 2, 17
Tennant v. *Jefferson Cnty. Comm'n*, 133 S. Ct. 3, (2012) 8, 20
Thornburg v. *Gingles*, 478 U.S. 30 (1986) 2, 23, 33
Truax v. *Raich*, 239 U.S. 33 (1915) 28
Vieth v. *Jubelirer*, 541 U.S. 267 (2004) 32
Voinovich v. *Quilter*, 507 U.S. 146 (1993) 32, 33
Wells v. *Rockefeller*, 394 U.S. 542 (1969) 20
Wesberry v. *Sanders*, 376 U.S. 1 (1964) ..... *passim*
Whitcomb v. *Chavis*, 403 U.S. 124 (1971) 15
White v. *Regester*, 412 U.S. 755 (1973) 11, 29
White v. *Weiser*, 412 U.S. 783 (1973) 13, 20
Wise v. *Lipscomb*, 437 U.S. 535 (1978) 15
Yick Wo v. *Hopkins*, 118 U.S. 356 (1886) 28
Zimmer v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973), aff'd, 424 U.S. 636 (1975) 25

Constitutions and statutes:

U.S. Const.:
Art. I, § 2 ..... 2, 5, 18, 19, 20
Amend. XIV 1, 17, 18
§ 1 (Equal Protection Clause) ..... *passim*
§ 2 ..... 3, 6, 10, 18, 19, 20
Amend. XV, § 1 19
Amend. XIX 19

Statutes—Continued: Page

Haw. Const. Art. IV:
§ 4 12
§ 6 12
Kan. Const. Art. 10, § 1(a) 12
N.Y. Const. Art. III, § 5-a 12
Tex. Const.:
Art. III:
§ 1 3
§ 25 ..... 3, 34
§ 25 (1964) 3
§ 26 3
§ 28 3
Voting Rights Act of 1965, 52 U.S.C. 10301 *et seq.* 1
§ 2, 52 U.S.C. 10301 (§ 2) ..... *passim*
52 U.S.C. 10301(b) 2
52 U.S.C. 10308(d) 1
13 U.S.C. 141(a) 2
13 U.S.C. 141(c) 22
28 U.S.C. 2284(a) 4
Cal. Election Code § 21003 (West Supp. 2015) 12
Del. Code Ann. tit. 29, § 804A (2015) 12
Md. Code Ann., State Gov't, § 2-2A-01 (LexisNexis 2014) 12
N.Y. Legis. Law § 83-m(13) (McKinney 2015) 12

Miscellaneous:

Stephen Ansolabehere et al., *Equal Votes, Equal Money: Court-Ordered Redistricting and Public Expenditures in the American* States, 96 Am. Pol. Sci. Rev. 767 (2002) 28

Miscellaneous—Continued: Page

Cong. Globe, 39th Cong., 1st Sess. (1866):
p. 141 18
p. 359 18
Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-born Population of the United States: 1850-1990* (U.S. Census Bureau, Population Division Working Paper No. 29, 1999) tbl. 13, http://www.census.gov/population/www/documentation/twps0029/tab13.html 16
H.R.J. Res. 75, § 1.01, 2001 Tex. Gen. Laws 6709 3
L.R. 102, 102d Leg., 1st sess. (Neb. 2011) 12
Nat'l Conf. of State Legislatures, *2010 NCSL Congressional and State Legislative Redistricting Deviation Table*, http://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx (last visited Sept. 24, 2015) 12
1981 Op. Tex. Att'y Gen. 1156, No. MW-350 (May 30, 1981) 3
Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391 (1993) 19
The Federalist No. 54 (James Madison) 18
Michael Shepherd, *Maine Commission Unanimously Approves Redistricting*, Kennebec J., May 31, 2013, http://www/ pressherald.com/2013/05/31/bipartisan-panel- approves-maine-legislative-redistricting/ (last visited Sept. 24, 2015) 12

Miscellaneous—Continued: Page

Christopher Uggen, Sarah Shannon & Jeff Manza, *State-Level Estimates of Felon Disenfrachisement in the United States, 2010* (July 2012), http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf 33

U.S. Census Bureau:

A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know (Oct. 2008), https://www.census.gov/content/dam/Census/library/publications/2008/acs/ACSGeneralHandbook.pdf 23

Redistricting Data, http://www.census.gov/rdo/data/113th_congressional_and_2012_state_legislative_district_plans.html (last visited Sept. 24, 2015) 12

Strength In Numbers: Your Guide to Census 2010 Redistricting Data From the U.S. Census Bureau (July 2010), http://www.census.gov/rdo/pdf/StrengthInNumbers2010.pdf 22

http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003&prodType=table (last visited Sept. 24, 2015) 33

http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003B&prodType=table (last visited Sept. 24, 2015) 33

Miscellaneous—Continued: Page

http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003D&prodType=table (last visited Sept. 24, 2015) 33

http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_ B05003H&prodType=table (last visited Sept. 24, 2015) 33

http://factfinder.census.gov/faces/ tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_ B05003I&prodType=table (last visited Sept. 24, 2015) 33

U.S. Dep't of Justice, Immigration & Naturalization Serv., *Annual Report of the Immigration and Naturalization Service* (1961), http://archive.org/stream/annualreport ofim1961unit#page/10/mode/2up 16

In the Supreme Court of the United States

No. 14-940

SUE EVENWEL, ET AL., APPELLANTS

v.

GREG ABBOTT, GOVERNOR OF TEXAS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING APPELLEES

INTEREST OF THE UNITED STATES

This case involves a claim that the Equal Protection Clause of the Fourteenth Amendment requires States to equalize the number of eligible voters across state legislative districts. The United States participated as *amicus curiae* in this Court's cases establishing the legal framework for claims of malapportioned state legislative districts under the Equal Protection Clause. *E.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Baker* v. *Carr*, 369 U.S. 186 (1962). In addition, the United States, through the Attorney General, has primary responsibility for enforcing Section 2 of the Voting Rights Act of 1965, 52 U.S.C. 10301 *et seq.* (Voting Rights Act), and therefore has a substantial interest in ensuring that States and localities draw legislative districts that comply with both the Equal Protection Clause and the Voting Rights Act. Finally,

the United States is responsible for conducting the decennial census, which provides the total population data States use to draw federal congressional and state legislative districts. U.S. Const. Art. I, § 2; Amend. XIV, § 2; 13 U.S.C. 141(a).

STATEMENT

1. Drawing state legislative districts is a sovereign function of the States. *Growe* v. *Emison*, 507 U.S. 25, 34 (1993); *Chapman* v. *Meier*, 420 U.S. 1, 27 (1975). States therefore have considerable discretion to engage in the balancing and compromises inherent in the often difficult districting process. *Miller* v. *Johnson*, 515 U.S. 900, 915 (1995); *Connor* v. *Finch*, 431 U.S. 407, 414-415 (1977). That discretion is constrained, however, by the Constitution and by federal law. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 325 (1966); *Gomillion* v. *Lightfoot*, 364 U.S. 339, 347-348 (1960).

The Equal Protection Clause requires States to draw legislative districts that are substantially equal in population and prohibits States from unjustifiable discrimination or undue reliance on certain characteristics when redistricting. *Gaffney* v. *Cummings*, 412 U.S. 735, 744, 751-752 (1973); *Reynolds* v. *Sims*, 377 U.S. 533, 568 (1964). Through Section 2 of the Voting Rights Act, 52 U.S.C. 10301, Congress prohibited States from implementing voting practices (including redistricting) that, based on the totality of circumstances, result in a racial group or language minority "hav[ing] less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b); *Thornburg* v. *Gingles*, 478 U.S. 30, 43 (1986).

2. Texas has a bicameral legislature consisting of a Senate and a House of Representatives. Tex. Const. Art. III, § 1. The Texas Constitution requires the legislature to reapportion the State's legislative districts during the first regular session following publication of the United States decennial census. *Id.* § 28; J.S. App. 4a. The state constitution specifies that members of the Texas House of Representatives must be apportioned among counties "according to the number of population in each, as nearly as may be, on a ratio obtained by dividing the population of the State, as ascertained by the most recent United States census, by the number of members of which the House is composed." Tex. Const. Art. III, § 26.

The Texas Constitution does not, however, specify any population requirement for drawing state senatorial districts. It merely requires that the State shall be divided into districts of "contiguous territory" and that "each district shall be entitled to elect one Senator." Tex. Const. Art. III, § 25. Until 2001, the state constitution required the legislature to divide the State into senatorial districts "according to the number of qualified electors." Tex. Const. Art. III, § 25 (1964). Through a constitutional amendment, the Texas legislature removed that requirement. H.R.J. Res. 75, § 1.01, 2001 Tex. Gen. Laws 6709.[1]

In 2013, the Texas legislature adopted, and the Governor signed into law, the state senatorial redistricting plan at issue in this case, Plan S172. J.S. App.

---

[1] In 1981, the Attorney General of Texas had concluded that the requirement that senatorial districts be divided on the basis of qualified electors violated the federal Constitution. 1981 Op. Tex. Att'y Gen. 1156, 1157, No. MW-350 (May 30, 1981) (citing *Reynolds*, 377 U.S. at 577).

5a, 17a-18a. This plan used total population as the basis to draw state senatorial districts and sought to equalize the number of people across those districts. *Id.* at 18a. The total deviation from the ideal population under the plan was 8.04%. *Id.* at 5a.

3. Appellants are registered voters and residents of two different Texas senate districts. In 2014, they sued the Governor and the Secretary of State of Texas in their official capacities (Texas) to enjoin the enforcement of Plan S172. J.S. App. 5a, 17a-35a. Appellants alleged that Plan S172 violated the "one-person, one-vote" principle of the Equal Protection Clause because, although the state senatorial districts were roughly equal in total population, the districts were malapportioned when measured by what appellants refer to as "eligible voters." See Appellants' Br. 2, 8-12; J.S. 6-11; J.S. App. 5a-6a, 18a-19a, 25a-32a.

4. The district court convened a three-judge panel pursuant to 28 U.S.C. 2284(a) and granted Texas's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. J.S. App. 3a-14a. The court found that appellants had not alleged a *prima facie* violation of the Equal Protection Clause because their complaint admitted that Plan S172 had achieved substantial population equality using total population, Texas's chosen redistricting metric. *Id.* at 8a.

The district court rejected appellants' argument that Texas was required to achieve equality in the number of eligible voters, concluding that the argument lacked legal support and was inconsistent with this Court's decision in *Burns* v. *Richardson*, 384 U.S. 73 (1966). J.S. App. 9a-14a.

SUMMARY OF ARGUMENT

In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), the Court held that, under the Equal Protection Clause, "the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568. A State satisfies that constitutional command when it draws state legislative districts that equalize total population—as all 50 States currently do—even if the districts contain unequal numbers of eligible voters.

A. The Equal Protection Clause does not require States to draw legislative districts that equalize "eligible voters" rather than total population. Appellants' claim must therefore fail.

The holding in *Reynolds* rested on the premise, recognized in the Court's decision addressing congressional districting in *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), that "the fundamental principle of representative government in this country is one of *equal representation for equal numbers of people*." *Reynolds*, 377 U.S. at 560-561 (emphasis added). Equalizing total population across districts vindicates that principle. It ensures that the voters in each district have the power to elect a representative who represents the same number of constituents as all other representatives.

Appellants' insistence that States equalize voter population is impossible to reconcile with the Constitution's treatment of congressional districting. As *Wesberry* makes clear, the same principles of representative government that underlie *Reynolds* are also embodied in the constitutional provisions governing the apportionment of the federal House of Representatives. U.S. Const. Art. I, § 2; Amend. XIV, § 2.

Those constitutional provisions were purposely drafted to apportion congressional seats based on the actual number of inhabitants in each State, not the number of voters, and the Court has held that those provisions require congressional districts to be drawn on the basis of total population. *Wesberry*, 376 U.S. at 7-9. It cannot be the case that Section 1 of the Fourteenth Amendment sometimes forbids States from using the population metric for state legislative districts that Section 2 of the Fourteenth Amendment requires States to use when districting for federal elections.

There are, moreover, practical reasons to respect the States' uniform practice of using total population for districting. Total population is the only figure for which there is precise data, collected every ten years through the federal census.

B. The Court should not reach Texas's argument that States are not required under the Equal Protection Clause to equalize total population. Texas has chosen to redistrict in a manner that equalizes total population, and the parties do not dispute that if total population is a permissible benchmark, appellants' claims must fail. This Court thus lacks the full adversarial presentation from the parties to make resolution of the issue appropriate. Any such resolution should await a case in which a State has chosen to redistrict based on a metric other than total population, so that the State's justifications for doing so can be considered in a concrete context.

Restraint is, moreover, particularly warranted here where there are at the very least reasons to doubt the correctness of Texas's position. Texas's position is in tension with this Court's recognition that elected

officials are responsible to their entire constituency, not just to those who can or do vote. Allowing States the unfettered discretion that Texas seeks to choose the relevant population base for purposes of the Equal Protection Clause multiplies the opportunities for gerrymandering and other gamesmanship that entrenches incumbents and limits participatory democracy. And equalizing total population across districts is consistent with the current practice throughout the Nation.

Existing Equal Protection Clause doctrine already affords States substantial latitude to pursue a range of policies in redistricting; indeed, Texas may use a range of data and population measures in its redistricting as long as the resulting districts equalize total population. A requirement that States equalize total population is not inconsistent with the holding in *Burns* v. *Richardson*, 384 U.S. 73 (1966), which, despite broad language, set forth a narrow holding. The Court upheld Hawaii's use of registered voters as an apportionment base only because the resulting districts reflected more accurately the distribution of the overall population of Hawaii residents than did the 1960 federal census data.

Even if Texas is correct that States retain discretion under the Equal Protection Clause to choose which population base to equalize, the Court should recognize that federal statutes—most particularly the Voting Rights Act—place limits on that choice. Thus, States could not pursue the goal of equal distribution of eligible voters if doing so would minimize or cancel out the voting strength of racial minority groups, in violation of Section 2 of the Voting Rights Act.

C. In this case, the district court properly dismissed appellants' complaint. Texas equalized the total population across its state senatorial districts within a permissible deviation of 8.04%.

ARGUMENT

THE EQUAL PROTECTION CLAUSE DOES NOT REQUIRE THE STATES TO EQUALIZE "ELIGIBLE VOTERS" RATHER THAN TOTAL POPULATION WHEN CREATING STATE LEGISLATIVE DISTRICTS

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), this Court set forth the constitutional framework for evaluating claims of malapportionment in state legislative districts. The Court held that, under the Equal Protection Clause, "the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568.

In subsequent cases, the Court has recognized that, in applying that general rule of population equality, "more flexibility may * * * be constitutionally permissible with respect to state legislative apportionment than in congressional districting." *Gaffney* v. *Cummings*, 412 U.S. 735, 743-744 (1973) (citation omitted); see *Mahan* v. *Howell*, 410 U.S. 315, 324-325 (1973). Thus, although congressional districting for purposes of electing members to the federal House of Representatives requires States to justify "each significant variance between districts," *Karcher* v. *Daggett*, 462 U.S. 725, 731 (1983); see *Tennant* v. *Jefferson Cnty. Comm'n*, 133 S. Ct. 3, 8 (2012) (per curiam), state legislative redistricting plans with a population

deviation of less than 10% are presumptively constitutional, *Brown* v. *Thomson*, 462 U.S. 835, 842 (1983); *Larios* v. *Cox*, 300 F. Supp. 2d 1320, 1340-1341 (N.D. Ga.) (three-judge court) (per curiam), aff'd, 542 U.S. 947 (2004).

In *Burns* v. *Richardson*, 384 U.S. 73 (1966), the Court stated that it had "carefully left open" in *Reynolds* "the question what population was being referred to" when it held that state legislative districts must be apportioned substantially on a population basis. *Id.* at 91. The question in this case is whether a state legislative apportionment based on total population satisfies the Equal Protection Clause. The answer to that question is yes.

A. Equalizing Total Population Across State Legislative Districts Satisfies The Equal Protection Clause

Appellants contend (Br. 19-29, 37-41) that the Equal Protection Clause requires States to equalize "eligible voters" rather than total population when redistricting for state and local offices. Appellants' argument—which would upend long-established practice in all 50 States—ignores core principles that animate this Court's Equal Protection Clause jurisprudence, creates anomalies when compared to the Constitution's treatment of districting for federal offices, and overlooks practical difficulties that States would face if they were required to base redistricting decisions on measures of voter population.[2]

---

[2] In addition to the district court in this case, every court of appeals to have considered the question has concluded that States are not required to equalize the voting-age population or citizen-voting-age population among state legislative districts. See *Loeber* v. *Spargo*, 391 Fed. Appx. 55, 58 (2d Cir. 2010), cert. denied, 131 S. Ct. 2934 (2011); *Chen* v. *City of Hous.*, 206 F.3d 502, 522-528 (5th

1. The Court has consistently evaluated redistricting plans for compliance with the Equal Protection Clause by examining equality of total population

a. An unbroken line of cases from *Reynolds* to *Board of Estimate of New York* v. *Morris*, 489 U.S. 688 (1989), establishes a "general rule of population equality between electoral districts." *Id.* at 692-693; see *Chapman* v. *Meier*, 420 U.S. 1, 22 (1975); *Mahan*, 410 U.S. at 324-325; *Abate* v. *Mundt*, 403 U.S. 182, 185 (1971); *Avery* v. *Midland Cnty.*, 390 U.S. 474, 484-485 (1968).

In *Reynolds*, the Court considered an equal protection challenge to the apportionment of seats in the Alabama legislature. 377 U.S. at 537. The plaintiffs alleged that because "the population growth in the State from 1900 to 1960 had been uneven," their county and other counties "were now victims of serious discrimination with respect to the allocation of legislative representation." *Id.* at 540. The Court also considered an amendment included in an alternative plan that would have allotted one senator to each county in the State, similar to the United States Senate. *Id.* at 571. The Court held that, under the Equal Protection Clause, "both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568.

The Court's holding rested on the premise—recognized in the Court's decision in *Wesberry* addressing districting for the United States House of Representatives under Section 2 of the Fourteenth

---

Cir. 2000), cert. denied, 532 U.S. 1046 (2001); *Daly* v. *Hunt*, 93 F.3d 1212, 1227-1228 (4th Cir. 1996); *Garza* v. *County of L.A.*, 918 F.2d 763, 773-776 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991).

Amendment—that "the fundamental principle of representative government in this country is one of *equal representation for equal numbers of people*, without regard to race, sex, economic status, or place of residence within a State." *Reynolds*, 377 U.S. at 560-561 (emphasis added). The Court stated that a districting scheme that "give[s] the same number of representatives to unequal numbers of constituents" is no different from a state law requiring that the votes of residents in one part of a State be counted twice (or five times, or ten times). *Id.* at 562-564.

Although the Court subsequently stated in *Burns* that it had never clarified what population must be equalized among state legislative districts, the Court has continued to uphold apportionments that are based on total population. *E.g.*, *Brown*, 462 U.S. at 838-840; *Connor* v. *Finch*, 431 U.S. 407, 416-418 (1977); *White* v. *Regester*, 412 U.S. 755, 761 (1973). Indeed, in *Gaffney*, the Court upheld an apportionment based on total population while explicitly recognizing that using that metric may not precisely equalize the number of voters in each district. 412 U.S. at 746-747. The Court nevertheless reviewed Connecticut's redistricting plan by looking at total population, while acknowledging that using a total population baseline to review the congressional districts in some States would produce considerable (20% to 29%) variation in the distribution of age-eligible voters. *Id.* at 747 & n.13.

The States have responded accordingly. To our knowledge, all States use total population data collected through the federal census to measure their compliance with constitutional requirements for both congressional and state legislative redistricting.

See, *e.g.*, Nat'l Conf. of State Legislatures, *2010 NCSL Congressional and State Legislative Redistricting Deviation Table*, http://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx (last visited Sept. 24, 2015).[3] Apportionment plans that equalize total population satisfy the Equal Protection Clause because they ensure equal representation for equal numbers of people—and thereby vindicate the core principle that

---

[3] Hawaii and Kansas seek to adjust census data to exclude certain non-permanent residents. See Haw. Const. Art. IV, §§ 4, 6; Kan. Const. Art. 10, § 1(a). California, Delaware, New York, and Maryland seek to adjust for prisoners' last known residence rather than where they are incarcerated. See Cal. Election Code § 21003 (West Supp. 2015) (effective 2020); Del. Code Ann. tit. 29, § 804A (2015) (effective 2020); N.Y. Legis. Law § 83-m(13) (McKinney 2015); Md. Code Ann., State Gov't, § 2-2A-01 (LexisNexis 2014). A list of the known adjustments to census data in state legislative redistricting is available at Redistricting Data, http://www.census.gov/rdo/data/113th_congressional_and_2012_state_legislative_district_plans.html (last visited Sept. 24, 2015).

The appendix to Texas's brief indicates that the constitutions of Maine, Nebraska, and New York appear to exclude aliens from the apportionment base for state legislative districts. See Tex. Br. App. 16a, 23a, 28a. None of those provisions is operational as written. See *In re 1983 Legislative Apportionment of House, Senate, and Congressional Districts*, 469 A.2d 819, 827-829 (Me. 1983); Michael Shepherd, *Maine Commission Unanimously Approves Redistricting*, Kennebec J., May 31, 2013, http://www.pressherald.com/2013/05/31/bipartisan-panel-approves-maine-legislative-redistricting/ (last visited, Sept. 24, 2015) (commission drew current legislative districts based on total population data from the 2010 census); L.R. 102, 102d Leg., 1st Sess. (Neb. 2011) (directing commission to use population data from the 2010 census); N.Y. Const. Art. III, § 5-a (nullifying constitutional provision excluding aliens from apportionment base).

animates the Court's equal-protection holding in *Reynolds*.

b. Appellants' contention that the Equal Protection Clause requires States to equalize the number of eligible voters across districts to protect against debasement of voting power is based on language in the Court's opinions stating that districting must ensure that "equal numbers of voters can vote for proportionally equal numbers of officials." *E.g.*, *Hadley* v. *Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 56 (1970). But such language should not be understood to mean that the Equal Protection Clause requires States to equalize the number of voters across districts. The Court made many comparable references to voter equality in *Wesberry*, in the course of holding that congressional districts must be drawn on the basis of total population. See 376 U.S. at 7 ("If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand."). But votes cast for members of Congress will not necessarily be "given as much weight as any other vote" as appellants see it, because congressional districts are drawn on the basis of total population without necessarily containing equal numbers of eligible voters. See Part A.2, *infra*.[4]

---

[4] The "one-person, one-vote" principle is relevant to both congressional and legislative redistricting. See *Brown*, 462 U.S. at 848 (O'Connor, J., concurring) ("the 'one-person, one-vote' principle is the guiding ideal in evaluating both congressional and legislative redistricting schemes"); *White* v. *Weiser*, 412 U.S. 783, 799 (1973) (Marshall, J., concurring) (referring to "the constitutional requirement of 'one man, one vote'" in a congressional districting case); *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 527-528 (1969) (stating that "Art. I, § 2, of the Constitution requires that 'as nearly as is

Moreover, redistricting plans that equalize total population do protect against debasement of voting power. A voter in an overpopulated district (measured by total population) suffers vote debasement as compared with a voter in a neighboring district, even when the two districts have the same voter population, because the voter in the first district secures a representative whose attention is spread more thinly. As the Court put the point in *Board of Estimate*, "[i]f districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts." 489 U.S. at 693-694; see *Reynolds*, 377 U.S. at 563-564 (it would "run counter to our fundamental ideas of democratic government" to allow "a vote [to be] worth more in one district than in another" because of the "varied numbers of inhabitants" in each) (quoting *Wesberry*, 376 U.S. at 8).

Accordingly, nothing about the Court's discussion of "vote debasement" requires the conclusion that the Equal Protection Clause requires equality of voter population rather than total population. See *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 531 (1969) (explaining that "[e]qual representation for equal numbers of people is a principle designed to prevent" both "debasement of voting power *and* diminution of access to elected representatives") (emphasis added).

c. Appellants further contend (Br. 19-29) that the primacy of the Court's concern about voting strength is reflected in the fact that the plaintiffs in this

---

practicable one man's vote in a congressional election is to be worth as much as another's.'") (quoting *Wesberry*, 376 U.S. at 7-8).

Court's redistricting cases had standing to bring their claims based on their status as voters. But the conclusion does not follow from the premise. Standing to bring an equal-protection claim as a voter could be based on the voter's placement in a district of greater total population than other districts. See, *e.g.*, *Reynolds*, 377 U.S. at 540. Indeed, the Court found that voters had standing in *Wesberry* on precisely this basis, as appellants acknowledge. See Appellants' Br. 23-24 (describing that the plaintiffs in *Wesberry* had standing as "citizens and qualified voters" challenging a congressional map that deprived them of a constitutional right "to have their votes for Congressmen given the same weight as the votes of other Georgians") (citing *Wesberry*, 376 U.S. at 2-3).[5]

d. Appellants next posit (Br. 27-29, 38) that the Court has always meant to equalize voting power rather than equality of representation under the Equal Protection Clause, but that the Court never had any need to clarify that point because "[i]n the 1960s, the distribution of the voting population generally did not deviate from the distribution of total population." That contention is misconceived.

---

[5] In any event, contrary to appellants' assertions (Br. 22-26), this Court has never held that being a voter is the only source of standing for a challenge to a state redistricting plan. This Court described the plaintiffs in *Reynolds* and subsequent cases in terms that do not depend on their being voters. *Reynolds*, 377 U.S. at 537 (residents, taxpayers, and voters); accord *Miller* v. *Johnson*, 515 U.S. 900, 909 (1995) (residents); *Wise* v. *Lipscomb*, 437 U.S. 535, 537 (1978) (residents); *Whitcomb* v. *Chavis*, 403 U.S. 124, 128 (1971) (residents); *Hadley*, 397 U.S. at 51 (1970) (residents and taxpayers); *Avery*, 390 U.S. at 475 (taxpayer and voter); *Burns*, 384 U.S. at 75 (residents and qualified voters).

It has long been true—and the Court has long been aware—that total population and voter population need not go hand in hand. When *Reynolds* was decided, immigrants not only lived throughout the United States, but were also unevenly distributed. See Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-born Population of the United States: 1850-1990*, tbl. 13, (U.S. Census Bureau, Population Division Working Paper No, 29, 1999), http://www.census.gov/population/www/documentation/twps0029/tab13.html (showing number and percentage of foreign-born persons in different States in 1960 and 1970); U.S. Dep't of Justice, Immigration & Naturalization Serv., *Annual Report of the Immigration and Naturalization Service* 10-11 (1961), http://archive.org/stream/annualreportofim1961unit#page/10/mode/2up (map showing the number of alien address cards received in each state and reporting that the "alien population center continues to move toward the Southwest").

Furthermore, the Court was well aware of large disparities between minority and white communities with respect to the number of eligible voters when it first announced the rule of population equality in *Reynolds*. In *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), the plaintiffs had alleged that before Tuskegee enacted its unconstitutional racial gerrymander, the municipality contained 5397 African Americans (400 of whom were "qualified electors") and 1310 whites (600 of whom were "qualified electors"). Pet. Br., *Gomillion*, *supra* (No. 32), at 4. In other words, approximately 7% of African Americans in the municipality were eligible voters, as compared to approximately 46% of whites.

Contemporaneously with the decision in *Reynolds*, the Court noted congressional findings that across the country, States and localities were using literacy and "good character" tests, poll taxes, and grandfather clauses to render racial minorities ineligible to vote and to facilitate whites' eligibility to vote. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 310-311 (1966). Appellants' suggestion that the Court in *Reynolds* did not differentiate between persons residing in a State and persons eligible to vote because such a distinction was unnecessary is simply incorrect. Cf. *Morse* v. *Republican Party of Va.*, 517 U.S. 186, 235-236 (1996) (Breyer, J., concurring in the judgment).

In sum, a state legislative redistricting plan that equalizes total population across districts ensures equal representation for equal numbers of people, consistent with the theory of representative government that animates *Reynolds*. Certainly *Reynolds* and its progeny do not foreclose a State's approach that is consistent with both the language and foundations of *Reynolds* itself.

2. The principle of equality of representation is embodied in the Constitution

The concept of representative government underlying *Reynolds* is embodied in the constitutional provisions governing the apportionment of members of the House of Representatives, including the Fourteenth Amendment. Although those constitutional provisions do not apply directly to state legislative redistricting, appellants' argument would leave the Constitution at war with itself, sometimes prohibiting under the Equal Protection Clause for state offices the very approach that the Constitution requires for federal

offices. The Fourteenth Amendment cannot plausibly be read to produce such an odd result.

a. The Constitution provides that members of the House of Representatives are apportioned among the States "according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed," U.S. Const. Amend. XIV, § 2, and that "[t]he actual Enumeration" of such persons must be made every ten years as directed by Congress, U.S. Const. Art. I, § 2. Those provisions were purposely drafted to refer to "persons," rather than to voters, and to include people who could not vote. See Cong. Globe, 39th Cong., 1st Sess. 141 (1866) (statement of Rep. Blaine) ("As an abstract proposition no one will deny that population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot"); *id.* at 359 (1866) (statement of Rep. Conkling) (stating that "persons" and not "citizens of the United States" should be the basis of representation and apportionment because "[p]ersons" have always constituted the basis in the Constitution and because "it would narrow the basis of taxation and cause considerable inequalities in this respect, because the number of aliens in some States is very large, and growing larger now, when emigrants reach our shores at the rate of more than a State a year"); *The Federalist No. 54* (James Madison).

That choice of constitutional language reflects the historical fact that when the Constitution was drafted and later amended, the right to vote was not closely correlated with citizenship. In most places, many segments of the populace, including African Ameri-

cans and women, could not vote. U.S. Const. Amend. XV, § 1; Amend. XIX; *Minor* v. *Happersett*, 88 U.S. (21 Wall.) 162, 172 (1875). In contrast, from the Colonial period through the 1920s, some States extended the right to vote to non-citizens. *Id.* at 176-177; Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391, 1399-1417 (1993). As a consequence, the federal government acted in the name of (and thereby represented) all people, whether they were voters or not, and whether they were citizens or not. Article I, Section 2 and Section 2 of the Fourteenth Amendment reflect the judgment that "in allocating Congressmen the number assigned to each State should be determined * * * by the number of the State's inhabitants." *Wesberry*, 376 U.S. at 13; see *Federation for Am. Immigration Reform* v. *Klutznick*, 486 F. Supp. 564, 576-577 (D.D.C.) (three-judge court), appeal dismissed, 447 U.S. 916 (1980) (relying on the fact that Article I, Section 2 and Section 2 of the Fourteenth Amendment require the enumeration of all people to reject a claim that including people not lawfully present in the United States in the decennial census would result in congressional malapportionment).

b. In *Wesberry*, the Court considered a Georgia congressional redistricting plan that divided the State's population unequally among ten congressional districts. The Court held that the plan "debas[ed] the weight of appellants' votes" because the congressman in their district "ha[d] to represent from two to three times the number of people" as congressmen in some other districts. 376 U.S. at 2-4. Based on a historical understanding of Article I, Section 2 and Section 2 of

the Fourteenth Amendment, the Court held that "our Constitution's plain objective [was] making equal representation for equal numbers of people the fundamental goal for the House of Representatives." *Id.* at 18. Congressional districting must be accomplished on the basis of total population, and States must justify even minimal variations among districts. *Tennant*, 133 S. Ct. at 8; *White* v. *Weiser*, 412 U.S. 783, 790 (1973); *Kirkpatrick*, 394 U.S. at 527-528; *Wells* v. *Rockefeller*, 394 U.S. 542, 546 (1969); *Mahan*, 410 U.S. at 324-325.

When the Court reached its population-equality holding in *Reynolds*, it explained that although the constitutional provisions governing congressional apportionment and state legislative apportionment are separate (the former is governed by Article I, Section 2 and Section 2 of the Fourteenth Amendment, and the latter is governed by Section 1 of the Fourteenth Amendment), *Wesberry* had "clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people." *Reynolds*, 377 U.S. at 560-561.

c. The Court's analysis in *Wesberry* disposes of Appellants' claims. There is simply no basis for concluding that the Fourteenth Amendment requires States to apportion congressional districts based on total population, but simultaneously forbids them from apportioning state legislative districts on the same basis in some circumstances.

Appellants raise two principal arguments in response. First, they contend (Br. 42) that "the Constitution's formula for apportioning Congressional seats *across* States has no bearing on the requirements for

creating districts *within* each State." This Court rejected that argument long ago. In *Wesberry*, the Court stated that "[i]t would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others." 376 U.S. at 14.

Second, appellants contend (Br. 42-44) that the Court "rejected the 'so-called federal analogy'" in *Reynolds*. That is a considerable overstatement. The Court in *Reynolds* rejected the analogy only to the parts of the federal plan that compromised the principle of equality to the principle of state sovereignty, *i.e.*, the provisions that each State would have two Senators and at least one Representative. 377 U.S. at 571-577; see also *Gray* v. *Sanders*, 372 U.S. 368, 371, 378-379 (1963) (rejecting Georgia's county-unit system that operated similar to the Electoral College). The Court's holding that States must apportion legislative districts on a population basis, on the other hand, was explicitly based on the principle of "equal representation for equal numbers of people" established in *Wesberry* for federal congressional districting and reflected in Article I, Section 2 and Section 2 of the Fourteenth Amendment. *Reynolds*, 377 U.S. at 560-561. Equality of representation is not a "byproduct" (Appellants Br. 39) of the Court's principal concern of equalizing the number of voters across districts in apportionment cases. Rather, equality of representation is explicit in the constitutional provisions governing apportionment of the House of Representatives,

and it was the animating principle behind the Court's population-equality holding in *Reynolds*.

3. Data on total population collected through the federal census are the most precise data for use in redistricting

There is a practical reason as well for States and courts to use total population data. Census data on total population are the most precise population statistics. The decennial census is a 100% enumeration of a jurisdiction's population and consists of a single value for each geographic area. See *Klutznick*, 486 F. Supp. at 567. The redistricting data, published as a specific tabulation at the census block level (the base unit of redistricting plans), are contained in one of the first data sets released by the U.S. Census Bureau after each decennial census. 13 U.S.C. 141(c); U.S. Census Bureau, *Strength In Numbers: Your Guide to Census 2010 Redistricting Data From the U.S. Census Bureau* 4 (July 2010), http://www.census.gov/rdo/pdf/StrengthInNumbers2010.pdf. The U.S. Census Bureau must release this redistricting data by April 1 of the year following each decennial census, specifically so that States can use it for redistricting purposes. 13 U.S.C. 141(c).

Other population measures, even those compiled by the U.S. Census Bureau, are not nearly so precise. Citizen voting-age population estimates, for example, are drawn from the American Community Survey as a rolling statistical estimate with accompanying margins of error. See generally U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know* (Oct. 2008) (*American Community Survey Data*), https://www.census.gov/content/dam/

Census/library/publications/2008/acs/ACSGeneral Handbook.pdf. The U.S. Census Bureau explicitly cautions against using American Community Survey data as the basis for redistricting, given that these data are not an official population count. *Id.* at 4; see *Pope* v. *County of Albany*, No. 11-CV-0736, 2014 WL 316703, at *13 n.22 (N.D.N.Y. Jan. 28, 2014).

The relative size of the margin of error surrounding American Community Survey estimates grows as the geographic unit of analysis decreases in size. As a result, the U.S. Census Bureau releases block group data only as a five-year rolling average; it does not release data for individual census blocks. *American Community Survey Data* 3, 5, 10.

Furthermore, even if the American Community Survey were a 100% enumeration of the United States citizen population similar to the census, that would still not produce data sufficient to analyze the impact of redistricting on "eligible voters." Appellants identify no data that would identify which United States citizens are ineligible to vote due to state disenfranchisement laws. Counting the number of people who have registered to vote or who actually voted would exclude ineligible voters, but the Court in *Burns* properly warned against the use of registered voters or actual voters as an apportionment base. See 384 U.S. at 92-93; see also, *Thornburg* v. *Gingles*, 478 U.S. 30, 38-39 (1986); *Ely* v. *Klahr*, 403 U.S. 108, 118 (1971) (Douglas, J., concurring).

Appellants thus have not identified any data set that the States could use to implement their understanding of the Equal Protection Clause. The fact that such data are not available (and were not available at the time *Reynolds* was decided) further con-

firms that States are not required to use eligible voter data to satisfy the population-equality requirement of the Equal Protection Clause.

4. The Voting Rights Act does not suggest that reliance on voter population should be required.

Finally, appellants' amici contend that the use of voting-age population and citizen voting-age population data in Voting Rights Act litigation suggests that equalization of voter population rather than total population is appropriate. That argument is incorrect.

To be sure, when courts consider Section 2 challenges, they ask whether it would be possible to create districts in which a minority group constitutes a "numerical, working majority of the voting-age population," *Bartlett* v. *Strickland*, 556 U.S. 1, 13-20 (2009) (opinion of Kennedy, J.), or the pool of citizens of voting age, *League of United Latin Am. Citizens* v. *Perry*, 548 U.S. 399, 429 (2006). See Cato Inst. & Reason Found. Amicus Br. 8-9 (jurisdictional); Demographers Amicus Br. 15-20; Mountain States Legal Found. Amicus Br. 13-19 (jurisdictional), 15-23 (merits). That analysis is, however, undertaken against the "background rule" of a Section 2 inquiry that "districts have approximately equal populations." *Alabama Legis. Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1271 (2015).

The use of voting-age or citizen voting-age population data in the context of creating a majority-minority district does not imply that eligible voter data must be used for all redistricting purposes. The Equal Protection Clause and Section 2 of the Voting Rights Act protect distinct interests. The Equal Protection Clause ensures equality of representation, while Section 2 ensures that minorities have access to

the political process. See *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1303 (5th Cir. 1973) (en banc) ("[A]though population is the proper measure of equality in apportionment * * * , the Supreme Court [has] announced that access to the political process and not population [i]s the barometer of dilution of minority voting strength."), aff'd 424 U.S. 636 (1975). Based on that understanding, courts have consistently rejected arguments that Section 2 demonstrative or remedial plans containing districts of substantially equal population are invalid because the districts do not contain equal numbers of eligible voters. See *Lepak* v. *City of Irving*, 453 Fed. Appx. 522 (5th Cir. 2011); *Garza* v. *County of L.A.*, 918 F.2d 763, 773-776 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); *Montes* v. *City of Yakima*, 40 F. Supp. 3d 1377, 1396-1399 (E.D. Wash. 2014). In short, nothing in the distinct minority vote-dilution inquiry in Section 2 cases suggests that voter population rather than total population must be equalized for legislative redistricting.

* * * * *

Equalizing total population across districts is a longstanding practice that all 50 States follow. That practice reflects the theory of representative government underlying the Court's population-equality holding in *Reynolds* and embodied elsewhere in the Constitution, and it relies on the only apportionment base for which precise data are available. Texas's equalization of total population across districts in Plan S172 does not violate the Equal Protection Clause.

B. This Court Should Decline To Address Texas's Argument That States Are Not Required to Equalize Total Population

A ruling by this Court that Texas's districting plan satisfies the requirements of the Equal Protection Clause by equalizing total population fully answers the question presented in this case. Texas nonetheless asks (Br. 43-49) this Court to go further and hold that the Equal Protection Clause would likewise be satisfied had Texas equalized (some unspecified measure of) voter population instead. We respectfully submit that the Court should not do so because this case does not present a concrete controversy with respect to that issue. And restraint is particularly appropriate here because there are at the very least reasons to doubt that Texas is correct.

1. Texas's position is not the subject of full adversarial presentation

Texas's suggestion that the Equal Protection Clause does not require it to equalize total population is not ripe for review. Texas has chosen to apportion on the basis of total population, and the parties do not dispute that if total population is an appropriate benchmark for Equal Protection analysis, then Texas's plan is constitutional and appellants' claim must fail. In the absence of the plenary treatment that full adversarial briefing provides, the Court should decline to decide the issue. See, *e.g.*, *City & Cnty. of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1774 (2015) (declining to reach issue argued by the parties in light of the "absence of adversarial briefing").

The Court's usual caution is, moreover, particularly appropriate here, where Texas claims the need for state flexibility and discretion to depart from a dis-

tricting approach that reflects the current practice in all States and a principle of representative government embodied in our Constitution. Rather than decide the issue in the abstract, the Court should await a case in which a State has actually chosen to depart from the prevailing total population approach, so that the Court can consider the question in light of the concrete reasons the State has offered as justification.

2. There are at the very least reasons to doubt the correctness of Texas's position

The Court should likewise decline to address Texas's contention because there are at the very least reasons to doubt its correctness.

a. The principle of "equal representation for equal numbers of people" animates *Reynolds* and its progeny. Adopting Texas's hypothetical approach risks rendering residents of this country who are ineligible, unwilling, or unable to vote as invisible or irrelevant to our system of representative democracy. But this Court has recognized in a variety of contexts that elected officials are responsible to the popular will and represent their entire constituency, including those who do not vote. See *Shaw* v. *Reno*, 509 U.S. 630, 648, 650 (1993); *Davis* v. *Bandemer*, 478 U.S. 109, 131-132 (1986) (opinion of White, J.); *Reynolds*, 377 U.S. at 565-566; cf. *Karcher*, 462 U.S. at 748 (Stevens, J., concurring) ("When a State adopts rules * * * defining electoral boundaries, those rules must serve the interests of the entire community."); see also *Garza*, 918 F.2d at 774. A redistricting plan based on voters alone risks sending the distinct message that the political system is responsive to no one else.

"Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S. 717, 722 (1973). This principle likewise applies to eligible non-voters and, to a lesser extent, minors. Viewing people who do not vote as irrelevant to our system of representation would be especially inappropriate given that distribution of public resources tends to correlate with the distribution of political representation. See Stephen Ansolabehere et al., *Equal Votes, Equal Money: Court-Ordered Redistricting and Public Expenditures in the American States*, 96 Am. Pol. Sci. Rev. 767, 775-776 (2002).

The Court has long recognized that the Equal Protection Clause encompasses all persons—voters and non-voters, citizens and non-citizens alike. *Plyler* v. *Doe*, 457 U.S. 202, 210 (1982); *Truax* v. *Raich*, 239 U.S. 33, 39 (1915); *Yick Wo* v. *Hopkins*, 118 U.S. 356, 368-369 (1886). Equalizing total population across legislative districts ensures that our system of representative government provides equal representation to all people.

Allowing States to choose which populations to equalize for Equal Protection analysis would have other unfortunate consequences. It would, for example, exacerbate existing redistricting problems—problems this Court has recognized—by multiplying the opportunities for gerrymandering and other political gamesmanship that entrenches incumbents and excludes particular groups from full participation in the political process. And it could complicate enforcement and implementation of the Voting Rights Act. See Part B.3, *infra*.

On top of that, as noted above, equalizing total population comports with current state practice and the principle of representation reflected in the constitutional requirements in the context of redistricting for federal offices.

b. Texas contends (Br. 43) that adherence to a total population approach would deprive States of needed flexibility. Texas is correct that the Equal Protection Clause permits States flexibility, but it does not follow that flexibility requires that a State be permitted to district in a manner that results in dramatic differences in the total population of the resulting districts.

In contrast to congressional redistricting, the Court has consistently recognized that, in applying the general rule of population equality, "more flexibility may * * * be constitutionally permissible with respect to state legislative apportionment." *Gaffney*, 412 U.S. at 743-744; see *Mahan*, 410 U.S. at 324-325. State legislative redistricting plans may therefore take into account factors such as respecting municipal boundaries, preserving the cores of prior districts, drawing districts with regular boundaries, ensuring political fairness, and promoting particular representational goals. See, *e.g.*, *Karcher*, 462 U.S. at 740; *Connor*, 431 U.S. at 415-416; *Abate*, 403 U.S. at 185.

But current Equal Protection Clause doctrine provides States that flexibility for state offices. Thus, the Court has typically permitted States to deviate from total population equality among state legislative districts by up to 10% to accommodate districting decisions reflecting the States' history and legitimate political values. See *Brown*, 462 U.S. at 838-840, 842-844; *Connor*, 431 U.S. at 418; *Regester*, 412 U.S. at 761; *Abate*, 403 U.S. at 185. And even deviations of

greater than 10%—which establish a prima facie case of a constitutional violation—may be permissible if the State can show sufficient justification for the deviations.

Moreover, in the course of districting, the States may look to a range of data and population measures and may seek to equalize any number of populations, and that is true even if the resulting districts must also equalize total population. The need for state flexibility to pursue a range of legislative policies is reflected in current doctrine.

c. Texas also contends (Br. 18-23, 45) that any requirement that States equalize total population cannot be squared with this Court's decision in *Burns*. See also Appellants Br. 34-38. To be sure, there is considerable language in *Burns* that supports Texas's position here. But requiring States to equalize total population (with appropriate deviations) is fully consistent with the actual holding in *Burns*.

In *Burns*, the Court considered a Hawaii redistricting plan that used registered voters as the apportionment base, even though that metric distributed seats in the legislature differently than if "total population, as measured by the federal census figures" had been used. 384 U.S. at 90. The 1960 federal census data created "special population problems" for Hawaii because it included large numbers of military members and tourists that were not residents of the State. *Id.* at 94. Those tourists and military personnel were also "highly concentrated on Oahu" and "largely confined to particular regions of that island." *Ibid.*

The Court held that the Equal Protection Clause did not "require [Hawaii] to use *total population figures derived from the federal census*" as the basis for

measuring population equivalency. *Burns*, 384 U.S. at 91 (emphasis added). But the Court upheld Hawaii's use of registered voters as an apportionment base "*only* because on th[e] record it was found to have produced a distribution of legislators not substantially different from" that which would have resulted from the use of "state citizens or another permissible population base." *Id.* at 93, 95 (emphasis added).[6] The Court thus upheld Hawaii's plan because it reflected more accurately the distribution of the overall population of Hawaii residents than did the 1960 federal census data due to Hawaii's "special population problems." *Id.* at 94.[7]

---

[6] The "state citizens" apportionment base that the court concluded was permissible was not shorthand for "[s]tate citizen population eligible to vote," as appellants contend, Br. 35-36 (quoting *Burns*, 384 U.S. at 84 n.12), nor does it refer to United States citizenship, as Texas suggests (Br. 21-23). The footnote on which appellants' rely distinguishes among "[s]tate citizen population eligible to vote (*i.e.*, voter population)," "citizen population," and "total population." *Burns*, 384 U.S. at 84 n.12. That excerpt actually suggests that "state citizen population" is *not* the same as "state citizen population eligible to vote." A more plausible definition of "state citizen" is a permanent resident or person domiciled in Hawaii. See *Kostick* v. *Nago*, 960 F. Supp. 2d 1074, 1093 (D. Haw. 2013), aff'd, 134 S. Ct. 1001 (2014) ("Hawaii's definition of 'permanent residents' constitutes 'state citizens' by another name.").

[7] In the brief for the United States in opposition to the petition for a writ of certiorari to review the Ninth Circuit's decision in *Garza*, the government stated that, in *Burns*, the Court had "rejected [the] contention that [a] deviation from total population was inconsistent with *Reynolds*" and "relied on *Reynolds* to hold that a state may legitimately choose any one of three apportionment bases—eligible voters, citizen population, or total population." U.S. Br. in Opp. 15, *County of L.A.* v. *Garza*, No. 90-849 and A-422 (Dec. 1990). The government further explained, however, that the Court had subsequently made clear in *Karcher* that although

In short, in light of the substantial arguments that are left undeveloped by the parties, this Court should resist Texas's invitation to decide an important legal question before it is squarely presented.

3. States cannot draw legislative districts that attempt to equalize eligible voters if the resulting plan violates the Voting Rights Act

Even if a State decided to pursue the equalization of eligible voters among districts as a policy choice—which Texas did not do—the State must still comply with the Voting Rights Act. Thus, even if the Equal Protection Clause did not require Texas to equalize total population, the Voting Rights Act might still limit Texas's choice as to which population to equalize if the resulting redistricting plan, "designedly or otherwise," will "operate to minimize or cancel out" the voting strength of racial minority groups. *Burns*, 384 U.S. at 88 (quoting *Fortson* v. *Dorsey*, 379 U.S. 433, 439 (1965)).

In the context of single-member districts, there are two ways a minority group's voting power can be improperly diluted: either by "[d]ividing the minority group among various districts" (referred to as "cracking") or by "packing" members of a minority group "into districts where they constitute an excessive majority." *Voinovich* v. *Quilter*, 507 U.S. 146, 153-154 (1993) (internal quotation marks and citation omitted); *Gingles*, 478 U.S. at 46 n.11; see also *Vieth* v. *Jubelirer*, 541 U.S. 267, 286 n.7 (2004) (opinion of Scalia,

---

"various state interests, including the desire to equalize voting strength, may justify small deviations from population equality," "equal representation for equal numbers of people is still the basic constitutional imperative." *Id.* at 15 n.5.

J.). Section 2 of the Voting Rights Act prohibits either cracking or packing a minority community when the consequence of that practice is to deny minority voters an equal opportunity to participate in the political process and elect representatives of their choice. 52 U.S.C. 10301; *Voinovich*, 507 U.S. at 153-154.

The starting point for understanding why the equalization of eligible voters will in some circumstances require cracking or packing minority communities is demographic reality. In many jurisdictions, the voter population diverges from the total population because of racially- and ethnically-correlated differences related to age, citizenship, and socioeconomic factors. A higher proportion of the United States' minority population consists of children under the age of 18, and differences in citizenship rates create further disparities.[8] Even among citizens of voting age, African Americans and Hispanics are less likely than non-Hispanic whites to be eligible voters because of offender disenfranchisement laws. See Christopher Uggen, Sarah Shannon & Jeff Manza, *State-Level*

---

[8] Population data are available at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003&prodType=table (last visited Sept. 24, 2015); http://factfinder.census.gov/faces/tableservi-ces/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003B&prodType=table (last visited Sept. 24, 2015) (African-American); http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003D&prodType=table (last visited Sept. 24, 2015) (Asian); http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003H&prodType=table (last visited Sept. 24, 2015) (white, non-Hispanic); http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003I&prodType=table (last visited Sept. 24, 2015) (Hispanic).

Estimates of Felon Disenfrachisement in the United States, 2010, at 17 (Table 4) (July 2012), http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf. The consequence of these demographic and socioeconomic differences is that the ratio of voters-to-inhabitants is likely to be lower in heavily minority communities than in heavily white communities.

This may have consequences for a State's choice of population base. For example, a State may desire (as appellants suggest (Br. 46)) to create districts that are equal in both total population and eligible voters. But given demographics in many parts of the country, equalizing both total population and eligible voters would require districts that yoke together pieces of low voter-density minority neighborhoods with pieces of high voter-density white neighborhoods. The districts produced under this version of appellants' proposed rule would "crack" geographically compact and cohesive minority communities.

Likewise, if a State were to seek to equalize only the number of eligible voters across districts without regard to total population, "packing" (rather than "cracking") minorities might be the concern. That is, there are no doubt jurisdictions, including Texas, where the number of eligible minority voters is large enough to create districts under such a system with a majority non-white electorate. But if those districts are to be contiguous, Tex. Const. Art. III, § 25, they would have to contain significant numbers of those voters' neighbors and non-voting family members as well. The result would be that those districts would provide the opportunity to elect candidates of the minority community's choice at an unacceptable cost,

by overpopulating the majority-minority districts with significantly more inhabitants than majority-white districts contain. In practice, this packing would likely reduce the total number of opportunity districts that could be drawn and lead to vote dilution because minority voters would not have the same opportunity as other members of the electorate to elect representatives of their choice. 52 U.S.C. 10301; *Johnson* v. *De Grandy*, 512 U.S. 997, 1017-1021 (1994).

The Voting Rights Act, in short, provides an important limitation on the States' ability to choose among permissible apportionment bases, even if Texas is right that the Equal Protection Clause does not.

C. The District Court Correctly Dismissed Appellants' Complaint

Under this Court's precedents, appellants failed to state a *prima facie* claim of malapportionment under the Equal Protection Clause. In Plan S172, Texas equalized the number of people across its state senatorial districts within a *de minimis* deviation of 8.04%. See *Brown*, 462 U.S. at 842. Appellants did not allege that the deviation was the result of an arbitrary or discriminatory state policy. J.S. App. 8a. The plan therefore complies with the Equal Protection Clause.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
VANITA GUPTA
Principal Deputy Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General
MARK L. GROSS
ERIN ASLAN
Attorneys

SEPTEMBER 2015

Supreme Court, U.S.
FILED
SEP 24 2015
OFFICE OF THE CLERK

14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

—v.—

GREG ABBOTT, In His Official Capacity As Governor of Texas, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF TEXAS AS *AMICI CURIAE*, IN SUPPORT OF APPELLEES

Rebecca L. Robertson
Satinder Singh
AMERICAN CIVIL LIBERTIES
UNION OF TEXAS
1500 McGowen Street,
Suite 250
Houston, TX 77004

Sean J. Young
Counsel of Record
Steven R. Shapiro
Matthew A. Coles
Dale E. Ho
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
syoung@aclu.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES II

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. STATES HAVE AN OBLIGATION TO MAINTAIN A REPUBLICAN FORM OF GOVERNMENT 4

II. APPORTIONMENT BASED ON TOTAL POPULATION IS A LEGITIMATE WAY TO IMPLEMENT THE REPUBLICAN PRINCIPLE OF UNIVERSAL AND EQUAL REPRESENTATION 6

A. The Apportionment Clause Counted All "Persons" for Purposes of Representation in the House of Representatives. 7

B. The Republican Principle of Universal and Equal Representation is Neither Limited to the House of Representatives Nor Driven by Federalist Concerns 13

C. The Framers' Commitment to Representation for All People, Including Non-Voters, Finds Further Expression in the Petition Clause 19

III. THE EQUAL PROTECTION CLAUSE DID NOT DISPLACE THE REPUBLICAN PRINCIPLE OF UNIVERSAL AND EQUAL REPRESENTATION 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES

Arizona State Legislature v. Arizona Independent Redistricting Commission, 135 S. Ct. 2652 (2015) 4, 6, 26

Borough of Duryea, Pennsylvania v. Guarnieri, 131 S. Ct. 2488 (2011) 19, 20, 21

Burns v. Richardson, 384 U.S. 73 (1966) 2, 25

Cruz v. Beto, 405 U.S. 319 (1972) 20

Evenwel v. Abbott, 135 S. Ct. 2349 (2015) 2

Gaffney v. Cummings, 412 U.S. 772 (1973) 13

Gray v. Sanders, 372 U.S. 368 (1963) 14, 17

Gregory v. Ashcroft, 501 U.S. 452 (1991) 4

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966) 24

Kirkpatrick v. Preisler, 394 U.S. 526 (1969) 13

Luther v. Borden, 48 U.S. 1 (1849) 4

New York v. United States, 505 U.S. 144 (1992) 4

Obergefell v. Hodges, 135 S. Ct. 2584 (2015) 24

Oregon v. Mitchell,
400 U.S. 112 (1970) 22

Pollock v. Farmers' Loan & Trust Co.,
157 U.S. 429 (1895) 10

Reynolds v. Sims,
377 U.S. 533 (1964) 1, 14, 18, 25

United States v. Cruikshank,
92 U.S. 542 (1875) 19

Utah v. Evans,
536 U.S. 452 (2002) 11

Wong Wing v. United States,
163 U.S. 228 (1896) 8

CONSTITUTION & STATUTES

U.S. Const. art. I, § 2 ..... 7, 8, 10, 12

U.S. Const. art. I, § 8 8

U.S. Const. art. II, § 1 ..... 8, 15, 16

U.S. Const. art. III, § 1 4

U.S. Const. art. IV, § 4 ..... 3, 4, 26

U.S. Const. amend. I 19

U.S. Const. amend. XII 16

U.S. Const. amend. XIV, § 2 24

28 U.S.C. § 1253 2

28 U.S.C. § 2284 2

Mass. Const. of 1780, pt. 1, ch. 1, § III, arts. II, IV 16

N.Y. Const. of 1777, art. V 16

Pa. Const. of 1776, §§ 6, 17 16

Tenn. Const. of 1796, art. I, § 2; art. III, § 1 16

Vt. Const. of 1786, ch. I, § IX; ch. II, § VII 16

RULES

Federal Rule of Civil Procedure 12(b)(6) 2

OTHER AUTHORITIES

"Brutus," *Essay VI* (Dec. 27, 1787), reprinted in *The Anti-Federalist Papers* (Ralph Ketcham ed., 1986) 10

"DeWitt, John," *Essay III* (Nov. 5, 1787), reprinted in *The Anti-Federalist Papers* (Ralph Ketcham ed., 1986) 12

Declaration of Independence (U.S. 1776) ..... *passim*

Dulany, Daniel, *Considerations on the Propriety of Imposing Taxes in the British Colonies, for the Purpose of Raising a Revenue, by Act of Parliament* (2d ed. 1765) 22, 23

Elliot, J., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. 1861) ..... *passim*

Henry, Patrick, *Speech of June 5, 1788*, reprinted in *The Anti-Federalist Papers* (Ralph Ketcham, ed., 1986) 12

Higginson, Stephen A., *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142 (1986) 20

Keyssar, Alexander, *The Right to Vote* (rev. ed. 2009) 7

Mark, Gregory A., *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153 (1998)..... 20

The Federalist Papers (Clinton Rossiter ed., 1961) .....*passim*

The Federalist No. 10 (James Madison) 5, 6

The Federalist No. 37 (James Madison) 26

The Federalist No. 39 (James Madison) 5, 15

The Federalist No. 43 (James Madison) .....*passim*

The Federalist No. 54 (James Madison) .....*passim*

The Federalist No. 56 (James Madison) 23

The Federalist No. 57 (James Madison) 7

INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union Foundation (ACLU) is a nationwide, non-profit, non-partisan organization with approximately 500,000 members dedicated to the principles of liberty and equality enshrined in the Constitution and our nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court in numerous cases involving electoral democracy, including *Reynolds v. Sims*, 377 U.S. 533 (1964). The ACLU of Texas is a statewide affiliate of the national ACLU.

STATEMENT OF THE CASE

In 2013, the Texas Legislature, relying on 2010 Census data, adopted a redistricting plan (Plan S172) that apportioned the legislative seats of the Texas Senate so that each Senatorial District would contain substantially the same number of people. Plaintiffs-Appellants Sue Evenwel and Edward Pfenninger brought suit against the Texas Governor and Secretary of State in their official capacities, alleging that under Plan S172, the Senatorial Districts in which they reside contained more eligible or registered voters than other districts in violation of the Equal Protection Clause. Jurisdictional Statement Appendix ("J.S. App.") 18a. The case was

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of *amicus* briefs are on file with the Clerk's office.

assigned to a three-judge district court pursuant to 28 U.S.C. § 2284(a), and Defendants-Appellees moved to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

The district court granted the motion. It recognized that the Plaintiffs have "rel[ied] upon a theory never before accepted by the Supreme Court or any circuit court: that the metric of apportionment employed by Texas (total population) results in an unconstitutional apportionment because it does not achieve equality as measured by Plaintiffs' chosen metric—voter population." J.S. App. 9a. Relying principally on *Burns v. Richardson*, 384 U.S. 73 (1966), the district court explained that "a state's choice of apportionment base is not restrained beyond the requirement that it not involve an unconstitutional inclusion or exclusion of a protected group." J.S. App. 10a. It thus concluded that Texas's use of total population for apportionment purposes, in order to equalize the total number of inhabitants within each State Senate District, did not violate the Equal Protection Clause. J.S. App. 13a. Plaintiffs appealed directly to this Court, 28 U.S.C. § 1253, which noted probable jurisdiction. 135 S. Ct. 2349 (2015) (mem.).

SUMMARY OF ARGUMENT

The only question that this Court needs to answer to resolve this appeal is this: Should the Equal Protection Clause be read to prohibit States from apportioning their state legislatures on the basis of total population? The answer is no.

Every State was admitted into this Union on the condition that, within each State, a republican form of government "should be substantially maintained," Federalist No. 43 at 271 (James Madison) (Clinton Rossiter ed., 1961); *cf.* U.S. Const. art. IV, § 4, and since the framing of the United States Constitution, apportionment based on total population has been considered an acceptable way to put republican principles into effect. One republican principle embraced by the Founders was universal and equal representation, a principle consistent with their belief that a legitimate government derives its powers from all of the people. Declaration of Independence para. 2 (U.S. 1776). And one way of reflecting this principle was to count all persons for purposes of representation, and to apportion them equally with respect to the House of Representatives. Nothing suggests that the republican principle of universal and equal representation animating the design of the House of Representatives was limited to the federal government, and thus nothing suggests that States cannot also reflect these republican principles by modelling their apportionment systems after the House. And nothing about the later passage of the Equal Protection Clause, whose protections extend to all people, should be read to preclude this straightforward application of republican principles on behalf of all people living within the borders of a State. For these reasons, this Court should affirm the judgment below.

ARGUMENT

I. STATES HAVE AN OBLIGATION TO MAINTAIN A REPUBLICAN FORM OF GOVERNMENT.

The United States was "founded on republican principles," Federalist No. 43 at 271 (James Madison) (Clinton Rossiter ed., 1961), and the States have an obligation in our constitutional scheme to maintain a republican system of government. As James Madison explained in Federalist No. 43, "In a confederacy founded on republican principles, and composed of republican members, . . . the [members have a] right to insist that the forms of government under which the compact was entered into should be *substantially* maintained." *Id.* The express text of the Constitution provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government," U.S. Const. art. IV, § 4, but the Guarantee Clause also necessarily recognizes the power of the States to maintain a republican system of government for themselves. *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991).[2]

---

[2] This guarantee is also enforceable by Congress, and sometimes by the courts in appropriate cases. *See* U.S. Const. art. IV, § 4; *Luther v. Borden*, 48 U.S. 1, 42 (1849) (enforcing republican guarantee "rests with Congress"); U.S. Const. art. III, § 1; *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2660 n.3 (2015) (citing *New York v. United States*, 505 U.S. 144, 185 (1992) ("perhaps not all claims under the Guarantee Clause present nonjusticiable political questions")). These multiple layers of enforcement demonstrate the importance that the Framers attached to a republican form of government. For that very reason, it would be paradoxical to

The Framers generally agreed that the fundamental principles of republicanism included a government created by the people, and a government that represented all the people. Thus, in Federalist No. 39, Madison described a republican government as one "which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure for a limited period, or during good behavior." Federalist No. 39 at 237. Charles Pinckney, a delegate to the Constitutional Convention, similarly described a republic as one in which "the people at large, either collectively or by representation, form the legislature." 4 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 328 (2d ed. 1861) (hereafter "Elliot's Debates") (Pinckney) (South Carolina ratifying convention). In sum, a republican government is one "in which the scheme of representation takes place," and involves "the delegation of the government . . . to a small number of citizens elected by the rest . . . ." Federalist No. 10 at 76 (Madison).

The Constitution does not purport to prescribe the exact type of republican government each State is obliged to have, so long as States apply these basic principles. "Whenever the States may choose to substitute other republican forms, they have a right to do so and to claim the federal guaranty for the latter. The only restriction imposed on them is that

---

suggest that the Constitution precludes the States from taking steps to ensure that neither Congress nor the courts will need to step in to enforce this guarantee.

they shall not exchange republican for anti-republican Constitutions . . . ." Federalist No. 43 at 272 (Madison); *see also* 2 Elliot's Debates 168 (Stillman) (Massachusetts ratifying convention) ("each state shall choose such republican form of government as they please"); *cf. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) ("it is characteristic of our federal system that States retain autonomy to establish their own governmental processes"). And of course, to the Framers, one of the great virtues of the new government proposed by the Constitution was that it was very much a republic, even while it sought to accommodate the sovereignty of the many States. *See generally* Federalist No. 10 (Madison).

II. APPORTIONMENT BASED ON TOTAL POPULATION IS A LEGITIMATE WAY TO IMPLEMENT THE REPUBLICAN PRINCIPLE OF UNIVERSAL AND EQUAL REPRESENTATION.

The form of republican government that the Framers adopted for the United States incorporated an apportionment system based on total population. As discussed below, this system reflected the widely-accepted republican principle of universal and equal representation. This principle is in no way uniquely applicable to the Federal Government. It is also a principle that finds expression in the Petition Clause of the First Amendment. Thus, states should not be precluded from choosing to follow the example of our Founders as they seek to maintain a republican form of government for themselves.

A. The Apportionment Clause Counted All "Persons" for Purposes of Representation in the House of Representatives.

The Apportionment Clause provides that congressional representatives "shall be apportioned among the several States . . . according to their respective Numbers," which was based on "the whole Number of free Persons . . . ." U.S. Const. art. I, § 2.[3]

The Framers were well aware that "Persons" included those whom the States had excluded from the franchise. Federalist No. 54 at 335-36 (Madison) ("It is a principle of the proposed Constitution that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants, . . . [while] [i]n every State, a certain proportion of inhabitants are deprived of this right [of suffrage] by the constitution of the State, who will be included in the census by which the federal Constitution apportions the representatives."); Federalist No. 57 at 351 (Madison) ("each representative of the United States will be elected by five or six thousand citizens" only, notwithstanding apportionment of 30,000 per representative).[4] Indeed, they could have easily

---

[3] Of course, in condoning the Three-Fifths Compromise, the Framers departed from those principles in a way that history has rightly condemned and the post-Civil War Amendments corrected.

[4] As delegates from the different States, they knew, for instance, that women could not vote in any State (except in New Jersey), *see* Alexander Keyssar, *The Right to Vote* 306 n.1 (rev. ed. 2009), and that certain people who could not meet certain

based apportionment on the number of "Electors," a term that appears in the clause immediately preceding the Apportionment Clause. *See* U.S. Const. art. I, § 2, cl. 1 ("the Electors in each State shall have Qualifications requisite for Electors of the most numerous Branch of the State Legislature"). They did not do so.

Total population apportionment for the House of Representatives reflected the Framers' belief that all people are entitled to representation in a republican form of government. While the design of the Senate and the Electoral College largely reflected the fact that our republic was a federation of independent sovereigns, *see infra* Part II.B., the

---

property or taxpaying prerequisites also could not vote (except in Vermont), *see id.* at 306-07. They were aware that "Persons" included children, who could not vote.

They were aware that "Persons" would include newly-arrived, interstate migrants ineligible to vote under several states' lengthy durational residency laws. *See id.* (six months to two years residency requirements); *cf.* Federalist No. 43 at 273 (Madison) (referencing "the accession of alien residents, of a casual concourse of adventurers, or . . those whom the constitution of the state has not admitted to the rights of suffrage"). And they were aware that "Persons" could include non-citizens, since they expressly provided Congress the power to "establish a uniform Rule of Naturalization," U.S. Const. art. I, § 8, and elsewhere referred specifically to "natural born Citizen[s]" and "Citizen[s] of the United States at the time of the Adoption of this Constitution," U.S. Const. art. II, § 1. *See also Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (the word "person" includes noncitizens). Yet they declined to base apportionment only upon citizens, naturalized or otherwise.

The Framers thus ensured that all people were counted for purposes of representation, regardless of suffrage status.

value underlying the design of the House of Representatives was the thoroughly republican principle of universal and equal representation, as expressed by total population apportionment. *See* 1 Elliot's Debates 76 (John Adams, arguing for representation based on population during the debates over the Articles of Confederation, noting, "we stand here as the representatives of the people; that in some states the people are many, in others they are few; that therefore their vote here should be proportioned to the numbers from whom it comes. . . . [T]he interests within doors should be the mathematical representatives of the interests without doors."); 3 Elliot's Debates 111 (Corbin) (Virginia ratifying convention) ("Do they wish persons to be represented? Here . . . they are indulged; for the number of representatives is determined by the number of people . . . .").

The Framers understood that universal representation and total population apportionment could help ensure that the personal and unalienable rights of all people, not just voters, would be protected. As James Madison put it in Federalist No. 54, "It is not contended that the number of people in each State ought not to be the standard for regulating the proportion of those who are to represent the people of each State. . . . [T]he rule is understood to refer to the personal rights of the people, with which it has a natural and universal connection." Federalist No. 54 at 333; *see also* 5 Elliot's Debates 309 (Wilson) (Constitutional Convention) ("The cultivation and improvement of the human mind was the most noble object. With respect to this object, as well as to other *personal* rights, numbers were surely the natural and precise

measure of Representation."). After all, governments that "deriv[e] their just powers from the consent of the governed" must be designed to secure the unalienable and personal rights of life, liberty, and the pursuit of happiness for all, not just voters. Declaration of Independence para. 2 (U.S. 1776).

For other statesmen, population apportionment also reflected the republican belief that no one who contributes to society, e.g., through taxes, should be excluded from representation, regardless of voting status. *See Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 563-64 (1895); U.S. Const. art. I, § 2 ("Representatives *and direct Taxes* shall be apportioned among the several States . . . according to their respective Numbers . . . .") (emphasis added); 2 Elliot's Debates 36 (King) (Massachusetts ratifying convention) ("It is a principle of this Constitution, that representation and taxation should go hand in hand."). This, too, was tied to the idea that the government must take care to represent all those who fall under its care. 3 Elliot's Debates 320 (Henry) (Virginia ratifying convention) ("a thorough acquaintance with the condition of the people is necessary to a just distribution of taxes"). And Founding-Era statesmen were aware that the taxpaying population included those that could not vote. *See, e.g.*, "Brutus," *Essay VI* (Dec. 27, 1787), reprinted in *The Anti-Federalist Papers* 293, 297-98 (Ralph Ketcham ed., 1986) (taxation "reaches every person in the community in every conceivable circumstance," including women as

they go about their daily lives). That certainly holds true today.[5]

Walking hand-in-hand with the principle of universal representation is the idea that representation should be equal. Rather than a mere "byproduct" of the Constitution, Appellants' Br. at 17, 39, the principle of representational equality was embraced by Founding-Era statesmen and was reflected straightforwardly by assigning every representative the same number of people, whether voting or not. *See, e.g.*, 3 Elliot's Debates 111 (Corbin) (Virginia ratifying convention) ("That thirty thousand shall have one representative, no matter where. If this be not equal representation, what, in the name of God, is equal representation?"); 2 Elliot's Debates 90 (Parsons) (Massachusetts ratifying convention) ("Under this Constitution, an equal representation, immediately from the people, is introduced"); 3 Elliot's Debates 644 (Johnson) (Virginia ratifying convention) ("As to the principle of

---

[5] Opposing *amici* suggest, relying heavily on Federalist No. 54, that the primary purpose of tying both representation and taxation to numbers was to ensure accurate census-taking. Br. of Cato Inst. & Reason Found. as *Amici Curiae* Supporting Appellants ("Cato Br.") at 11-12. This gets things backwards. The purpose of the census was to help effectuate population apportionment, not the other way around. *See Utah v. Evans*, 536 U.S. 452, 475 (2002). While census accuracy was certainly a "salutary" byproduct of tying both representation and taxation to numbers, this secondary benefit was discussed at the end of Federalist No. 54, *see* Federalist No. 54 at 338, after Madison's half-hearted defense of the Three-Fifths Compromise. It was at the beginning of Federalist No. 54, right out of the gate, that Madison defended population apportionment on republican principles. *See id.* at 333.

representation, I find it attended to in this government in the fullest manner. It is founded on absolute equality.").[6]

The principle of equal representation followed naturally from the notion that the persons from whom consent is necessary for legitimate government were "created equal." Declaration of Independence para. 2. If too many constituents were assigned to any one representative, it would dilute constituent access and impair that representative's ability to understand the concerns of every part of their community. *See, e.g.*, "John DeWitt," *Essay III* (Nov. 5, 1787), reprinted in *The Anti-Federalist Papers* 329, 334 ("Have you a right to send more than one for every thirty thousand of you? Can he be presumed knowing to your different, peculiar situations . . . ? Or is there any possibility of giving him information?").[7] (And as discussed *infra* Part II.C.,

---

[6] Some opponents worried that the apportionment provision was too vague (i.e., "[t]he Number of Representatives *shall not exceed* one for every thirty Thousand," U.S. Const. art. I, § 2 (emphasis added)), and would result in unequal representation by allowing different States to choose different ratios (e.g., one for every 50,000), *see, e.g.*, Patrick Henry, *Speech of June 5, 1788*, reprinted in *The Anti-Federalist Papers* 199, 202-203; while supporters rushed to assure that this would not happen since no State would willingly reduce the number of representatives sent to Congress by adopting a 50,000 to one ratio, *see, e.g.*, 2 Elliot's Debates 271 (Harrison) (New York ratifying convention). But either way, both supporters and opponents of the Constitution agreed on the republican premise that representation should be equal.

[7] Though these concerns were primarily expressed as a critique that the number of constituents assigned per representative (30,000) was too high, such concerns would obviously be

non-voting populations were considered to be constituents that could present their concerns to their legislators.) While the size of congressional districts has grown with the growth in population, the underlying principle of equal representation remains fully applicable today. *See Gaffney v. Cummings*, 412 U.S. 772, 779 (1973) ("'Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives.'" (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969))).

Thus, the notion that non-voting populations could be counted for purposes of representation has long been considered a valid application of core republican principles.

B. The Republican Principle of Universal and Equal Representation is Neither Limited to the House of Representatives Nor Driven by Federalist Concerns.

Appellants and opposing *amici* acknowledge, as they must, that the Framers provided for equal apportionment for the House of Representatives on the basis of total population. Appellants' Br. at 42; Br. of Cato Inst. & Reason Found. as *Amici Curiae* Supporting Appellants ("Cato Br.") at 4-5. But they argue that it would be inappropriate for the States to model their apportionment system after the House of

---

relevant if anyone had suggested that some representatives should have more constituents than another.

Representatives. Appellants' Br. at 42-44; Cato Br. at 4-14.

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court rejected Alabama's attempt to model its apportionment system after the United States Senate, because the Senate's design of assigning each State the same number of votes regardless of their size was premised on the federalist notion of state sovereignty. *See id.* at 574. Because "[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities," *id.* at 575, it made no sense for Alabama to adopt the United States Senate model when apportioning for its state legislature.

Similarly, opposing *amici* argue, the decision to adopt total population apportionment for the House was a cold calculation driven by federalism considerations. They argue that if an elector-based system had been adopted instead, it would have supposedly created a "perverse incentive" for States to enfranchise as many people as possible so as to maximize the number of their representatives in the Federal Government, thereby creating a "race to the bottom." Cato Br. at 7-9. Appellants, for their part, also rely on *Gray v. Sanders*, 372 U.S. 368 (1963), where this Court rejected a State's attempt to model their state legislative system after the United States Electoral College. Appellants' Br. at 43; *see also* Cato Br. at 10-11.

Madison's own writings directly refute these arguments. He expressly drew a distinction between the republican principles underlying the House of Representatives and the federalist, state-sovereignty

principles underlying the Senate and, in part, the Electoral College. In other words, the total population apportionment system of the House of Representatives was *not* premised on federalist notions such as state sovereignty. More importantly, he expressly observed that *both the House of Representatives and the State legislatures* were animated by the *same* republican principles. He wrote:

> In order to ascertain the real character of the government, it may be considered in relation to . . . the sources from which its ordinary powers are to be drawn . . . . The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion and on the same principle as they are in the legislature of a particular State. . . . The Senate, on the other hand, will derive its powers from the States as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. . . . The executive power will be derived from a very compound source.[8]

---

[8] The Electoral College derived its powers from a "compound source" because it distributed votes based on the numbers of House of Representatives *and* Senate members from each State. *See* U.S. Const. art. II, § 1, cl. 2. It was further premised on state sovereignty principles by effectively allowing each State only one vote when no one presidential candidate received a

Federalist No. 39 at 239-40.

If the States and the House of Representatives are both essentially animated by the same republican principles, surely States should now be permitted to model their apportionment systems after the House.[9] The impropriety of States' modelling their systems after those that are

---

majority of votes, and by placing the choice of Vice President in the hands of the Senate under certain similar circumstances. *See* U.S. Const. art. II, § 1, cl. 3. These federalist features remained largely in place even after the system was modified by the Twelfth Amendment. *See* U.S. Const. amend. XII.

[9] While several early States apportioned their legislatures on a basis falling short of total population (e.g., by apportioning based on all "taxable inhabitants"), this simply demonstrates that the Framers may have also accepted other apportionment systems as being consistent with republican principles, in addition, of course, to the system prescribed for the House of Representatives. It is also worth noting that several of these States also rejected apportionment on the basis of elector status. *See, e.g.*, Pa. Const. of 1776, §§ 6, 17 (apportioning based on "taxable inhabitant" while limiting suffrage to certain "freemen"); Mass. Const. of 1780, pt. 1, ch. 1, § III, arts. II, IV (apportioning based on "ratable polls" while limiting suffrage to certain "male person[s]"); Vt. Const. of 1786, ch. I, § IX; ch. II, § VII (apportioning based on "taxable inhabitants" while limiting suffrage to "freemen"); Tenn. Const. of 1796, art. I, § 2; art. III, § 1 (apportioning based on "taxable Inhabitants" while setting residency and property qualifications for electors).

Only one State with a written constitution at the time of the founding used an apportionment system based on elector status, *see* N.Y. Const. of 1777, art. V, which Appellants erroneously argue should now be required for all States.

premised on state sovereignty, like the Senate and Electoral College, is simply inapplicable here.[10]

Given this clear distinction, it is unsurprising that Appellants and opposing *amici* do not point to any Founding-Era sources, or any part of the Constitution itself, which suggests that federalism concerns animated the principle of universal and equal representation as reflected in the House of Representatives. To the contrary, when the Framers described the importance of governments representing all people, they did not suggest that that ideal was driven by federalist principles.

For example, James Wilson, later a Supreme Court Justice, argued during the Constitutional Convention that the government "ought to possess" the "*mind or sense*[] of the people at large," and argued that "[t]he Legislature ought to be the most exact transcript of the whole society." 5 Elliot's Debates 160. George Mason similarly asserted at the Constitutional Convention that representatives "ought to know and sympathize with every part of the community," implored the Framers to "attend to the rights of every class of the people," 5 Elliot's Debates 136, and argued that "representatives should sympathize with their constituents; should

---

[10] In *Gray*, this Court explained that it was improper to model a state legislature after the Electoral College system because the College was based on a "collegiate principle" that the "election of the President [should not] be left to the people," 372 U.S. at 378, 376 n.8, an elitist concept which this Court observed as "belong[ing] to a bygone day," *id.* at 376 n.8. The republican principle of universal and equal representation, on the other hand, remains important today.

think as they think, and feel as they feel," 5 Elliot's Debates 161. *Cf.* 5 Elliot's Debates 258 (Hamilton) (Constitutional Convention) ("as states are a collection of individual men, which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition? Nothing could be more preposterous or absurd than to sacrifice the former to the latter."). "The system of representation in the two Houses of the Federal Congress . . . is one conceived out of compromise and concession indispensable for the establishment of our federal republic." *Reynolds*, 377 U.S. at 574. But the *values* underlying the House of Representatives are thoroughly republican in nature and accessible to the States.

Lastly, none of the Founding-Era sources cited by opposing *amici* actually suggest that population apportionment was adopted because of any fear of over-enfranchisement by the States, much less suggest that expanding the franchise was in and of itself anathema to a republic. The remarks by Madison that are cited by opposing *amici* reveal nothing more than a desire to allow States to remain in control of determining elector qualifications. *See, e.g.*, Cato Br. at 7 ("'[i]t is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate.'" (quoting Federalist No. 54)).

The values of universal and equal representation are not federalism values; they are

broader republican values that *both* the Federal and State governments embrace. *See* Federalist No. 43 at 271 (Madison). Far from reflecting a federalist scheme or a desire to minimize enfranchisement, the Apportionment Clause was based on total population in order to vindicate a basic republican principle of universal and equal representation. Accordingly, it is neither constitutionally anomalous nor constitutionally impermissible for a State to use the apportionment system for the House of Representatives as a model of republican governance.

C. The Framers' Commitment to Representation for All People, Including Non-Voters, Finds Further Expression in the Petition Clause.

By protecting the right of the people to petition the government for the redress of grievances, U.S. Const. amend. I, the First Amendment also reflects the Framers' commitment to the republican principle that all people governed by a legislature—and not only voters—are constituents who deserve a voice and representation.

"The very idea of a government, republican in form, implies a right . . . to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552 (1875); *see also Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011) (petitioning allows people "to express their ideas, hopes, and concerns to their government and their elected representatives"). As this Court has recently surveyed in detail, the right to petition is "of ancient significance in the English law and the Anglo-American legal tradition" dating back to the

Magna Carta. *See generally id.* at 2498-2500. In England, the Petition of Right of 1628 was issued by Parliament to the Crown, and "occupies a place in English constitutional history superseded in importance, perhaps, only by Magna Carta itself and the Declaration of Right of 1689." *Id.* at 2499. These values carried over to America, and "[a]s of 1781, seven state constitutions protected citizens' right to apply or petition for redress of grievances . . . ." *Id.* at 2503 (Scalia, J., concurring in part and dissenting in part) (citation omitted).

If a republican form of government guaranteed representation only to eligible voters, then one might reasonably expect the right to petition to be similarly limited. But, in fact, the right to petition has been exercised by non-enfranchised populations throughout this nation's history, including in petitions seeking to obtain the franchise in the first place. *See Guarnieri*, 131 S. Ct. at 2499-2500 ("Petitions allowed participation in democratic governance even by groups excluded from the franchise. For instance, petitions by women seeking the vote had a role in the early woman's suffrage movement." (citation omitted)); *see also, e.g., Cruz v. Beto*, 405 U.S. 319, 321 (1972) ("persons in prison," which necessarily includes felons who may not be allowed to vote, "like other individuals, have the right to petition the Government for redress of grievances"). Even in the colonial era, petitions were filed by "women, blacks (whether free or slave), Native Americans, and, perhaps, even children." Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153, 2182 (1998); *see id.* at 2183-87; *see also* Stephen A. Higginson, *A Short History of*

the Right to Petition Government for the Redress of Grievances, 96 Yale L.J. 142, 153 (1986) ("Not only the enfranchised population, but also unrepresented groups—notably women, felons, Indians, and, in some cases, slaves—represented themselves and voiced grievances through petitions.").

The Framers understood firsthand the importance of allowing the right to petition for non-enfranchised populations, for they themselves relied heavily on the right to petition in the pre-Revolutionary Era when they could not vote in Parliamentary elections. *See* 1 Elliot's Debates 42-49 (first congress of colonial delegates) (recounting several petitions from the colonists to the King in the pre-Revolutionary era). Indeed, the fact that they could not meaningfully exercise their petition right was a major contributing factor to the Declaration of Independence, which complained, "In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only be repeated injury." Declaration of Independence para. 30; *see Guarnieri*, 131 S. Ct. at 2499. It was thus all the more important that, under the new republic, the right to petition be meaningful especially for non-voting populations.

As Founding-Era statesmen recognized, a republic does not live by the carrot-and-stick of elections alone, but on constant feedback and interaction between the representatives and their

constituents.[11] Meaningful access for all was deemed critical for ensuring that representatives would be truly representative, i.e., familiar with the needs of all parts of their community. *See, e.g.*, 2 Elliot's Debates 13 (Heath) (Massachusetts ratifying convention) ("The representative is one who appears in behalf of, and acts for, others; he ought, therefore, to be fully acquainted with the feelings, circumstances, and interests of the persons whom he represents; and this is learnt among them, not at a distant court."). This included being familiar with the needs of non-voting populations.

Daniel Dulany, in a famous pre-Revolutionary pamphlet, argued that the British Parliament could not impose taxes upon Americans—not because Americans did not have the right to vote in Parliamentary elections, but because Americans had no meaningful opportunity to convey their concerns to Parliament. *See* Daniel Dulany, *Considerations on the Propriety of Imposing Taxes in the British*

---

[11] Madison, for instance, recognized that suffrage laws, while critical in a republican form of government, also had the potential to distort true representation:

> The qualifications of electors and elected were fundamental articles in a republican government . . . If the legislature could regulate those of either, . [a] republic may be converted into an aristocracy or oligarchy, as well by limiting the number . authorized to elect. Qualifications founded on artificial distinctions may be devised by the stronger in order to keep out partisans of a weaker faction.

5 Elliot's Debates 404 (Constitutional Convention); *see also Oregon v. Mitchell*, 400 U.S. 112, 210 (1970) (Harlan, J., concurring in part and dissenting in part).

Colonies, for the Purpose of Raising a Revenue, by Act of Parliament 8-9 (2d ed. 1765). Dulany pointed out that in medieval England, even women, who did not have the right to vote, actually consulted with lawmakers before taxes were imposed on them. *See id.* at 9 ("But, that the Reader may perceive how strictly the Principle of no Persons being Taxed without their Consent, hath been regarded, it is proper to take Notice, that, upon the same Occasion, Writs were likewise directed even to Women . . . to send their Deputies to consult, and consent to what should be judged necessary . . . "). Similarly, Madison expressly referred to non-voting populations as "constituents" in his writings. *See* Federalist No. 56 at 347 (referring to the 28,670 "constituents" assigned per representative in Britain, similar to the 30,000-to-1 ratio proposed).

In sum, the legitimacy of any government depends on the consent of all of the people, not just voters. *See* Declaration of Independence para. 2. That non-voters in particular are entitled to petition their government is simply another reflection of the fact that elected officials are responsible for representing all people. While many elected officials undoubtedly pay more attention to constituents who are able to vote, for better or for worse, that reality should not preclude a State from assigning to each of its elected representatives the same number of constituents, whether or not they vote.

III. THE EQUAL PROTECTION CLAUSE DID NOT DISPLACE THE REPUBLICAN PRINCIPLE OF UNIVERSAL AND EQUAL REPRESENTATION.

Appellants and opposing *amici* principally argue that the Equal Protection Clause should now be interpreted to require all States to apportion their legislative districts on the basis of elector status so that each district contains roughly the same number of eligible voters. The Equal Protection Clause has certainly outlawed certain past practices that were once apparently considered to be consistent with republican principles, such as poll taxes. *See Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668-69 (1966) (poll taxes unconstitutional under Equal Protection Clause); *id.* at 684 ("Property qualifications and poll taxes have been a traditional part of our political structure." (Harlan, J., dissenting)). Notions of equality are often more expansive than past generations have realized. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

However, nothing about the text or passage of the Fourteenth Amendment suggests that the preexisting republican principle of equal representation for all people was displaced. *See* Appellees' Br. at 39-41. To the contrary, the same amendment that introduced the Equal Protection Clause reaffirmed that apportionment by total population (now perfected with the elimination of the Three-Fifths Compromise) remained a legitimate way to make a republican system of government work. U.S. Const. amend. XIV, § 2. And though the specific question presented by this appeal was not squarely addressed in *Reynolds*, the fact that this

Court has readily gestured towards the importance of both representational equality and electoral equality in the same breath further suggests that there is nothing inherent in the Equal Protection Clause that has forcefully displaced the longstanding republican principle of universal and equal representation. *See, e.g.*, *Reynolds*, 377 U.S. at 562 ("Legislators *represent people*, not trees or acres. Legislators are *elected by voters*, not farms or cities or economic interests." (emphases added)); *see also Burns v. Richardson*, 384 U.S. 73, 91-92 (1966).

Where the Founders had the wisdom to build certain basic principles of equality into the government that they created, the equality guarantees of the Equal Protection Clause should not be read to *prohibit* States from adopting those very principles of equality.[12]

---

[12] Once this Court resolves the question of whether States should be permitted to adopt a total population apportionment system, it need not address either of the two questions that the City of Yakima, Washington, urges this Court to answer—questions that Yakima asserts will purportedly impact a case pending before the Ninth Circuit where Yakima had been found to violate Section 2 of the Voting Rights Act, and in which the ACLU serves as opposing counsel. *See* Br. of Yakima, Wash. as *Amicus Curiae* Supporting Appellants ("Yakima Br."). Yakima first asks this Court to address whether an apportionment system based on total population must also "strive to equalize the [citizen voting-age population ("CVAP")] among each district insofar as possible," Yakima Br. at 4, in disregard of the government's interest in remedying violations of Section 2 of the Voting Rights Act. Appellants, however, have not meaningfully raised this question and have instead asked this Court to rule that total population apportionment systems are "*per se* unconstitutional." Appellants' Br. at 44. Nor was the

* * *

"The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people." Federalist No. 37 at 223 (Madison). States that seek to give life to these principles by counting all people for purposes of representation act "in full harmony with the Constitution's conception of the people as the font of governmental power." *Ariz. State Legislature*, 135 S. Ct. at 2674. They embrace their constitutional duty to embrace republican principles. U.S. Const. art. IV, § 4. And although Appellants accuse these States of violating the Equal Protection Clause, if anything, these States are helping to vindicate its guarantees to *all* persons who seek to participate in our democracy.

---

challenged Texas redistricting plan, Plan S172, a response to a Section 2 violation. Second, Yakima asks this Court to prohibit single-member districts under vague hypothetical circumstances, *e.g.*, Yakima Br. at 22 (whether to prohibit single-member districts when all "unnecessary CVAP imbalance" is eliminated but "unavoidable CVAP imbalance" exists to "an extreme degree"), none of which are alleged to exist here. Indeed, Appellants do not challenge the propriety of single-member districts under any circumstance.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

Sean J. Young
Counsel of Record
Steven R. Shapiro
Matthew A. Coles
Dale E. Ho
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500
syoung@aclu.org

Rebecca L. Robertson
Satinder Singh
AMERICAN CIVIL LIBERTIES UNION OF TEXAS
1500 McGowen Street, Suite 250
Houston, TX 77004

Dated: September 24, 2015

No. 14-940

In The

Supreme Court of the United States

Sue Evenwel, Edward Pfenninger,

Appellants,

v.

Greg Abbott, in his official capacity as Governor of Texas, et al.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

Brief of the American Civil Rights Union as *Amicus Curiae* in Support of Appellants

Kaylan L. Phillips
Counsel of Record
PUBLIC INTEREST LEGAL FOUNDATION
209 W Main Street
Plainfield, IN 46168
(317) 203-5599
kphillips@publicinterestlegal.org
Counsel for Amicus Curiae
American Civil Rights Union

Table of Contents

Table of Authorities iii

Interests of *Amicus Curiae* 1

Summary of the Argument 2

Argument 4

I. The One-Person, One Vote Principle Protects the Rights of Voters to an Equal Vote 7

II. This Court's Precedents Protect the Right of Every Voter to an Equal Vote 10

III. The Department of Justice Uses Citizens Voting Age Population in its Enforcement of the Voting Rights Act 14

1. *United States v. Town of Lake Park* 15

2. *United States v. Euclid City School District Board of Education* 16

3. *United States v. The School Board of Osceola County* 17

4. *United State v. Georgetown County School District, et al.* 17

5. *United States v. City of Euclid, et al.* 18

6. *United States v. City of Boston* 19

7. *United States v. Osceola County* 19

8. *United States v. Alamosa County* 21

9. *United States v. Crockett County* 21

10. *United States v. Charleston County* 22

Conclusion 23

Table of Authorities

Cases

Baker v. Carr, 369 U.S. 186 (1962)..... 4,13-14

Burns v. Richardson, 384 U.S. 73 (1966)..... 7

Chen v. City of Houston, 532 U.S. 1046 (2001).... 7-8

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000)..... 7

Davis v. Perry, 991 F. Supp. 2d 809 (W.D. Tex. 2014)..... 5

Dunn v. Blumstein, 405 U.S. 330 (1972)..... 11

Gaffney v. Cummings, 412 U.S. 735 (1973)..... 12

Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990).....*passim*

Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960).. 13

Greg v. Sanders, 372 U.S. 368 (1963)..... 11

Hadley v. Junior Coll. Dist. Of Metro. Kansas City, Mo., 397 U.S. 50 (1970)..... 4,7,11

Reynolds v. Simms, 377 U.S. 533 (1964)..... 4,10-14

Snowden v. Hughes, 321 U.S. 1 (1944)..... 14

Thornburgh v. Gingles, 478 U.S. 30 (1986)..... 15-16, 18

United States v. Alamosa County, No. 01-B-2275 (D. Colo. 2001)..... 21

United States v. Charleston County, No. 2-01-0155 (D.S.C. 2001)..... 22

United States v. City of Boston, MA, No. 05-11598 (D. Mass. 2005)..... 19

United States v. City of Euclid, et al., No. 1:06-cv-01652 (N.D. Ohio 2006) 18

United States v. Crockett County, No. 1-01-1129 (W.D. Tenn. 2001) 21-22

United States v. Euclid City School District Board of Education, OH, No. 1:08-cv-02832 (N.D. Ohio 2008) 16-17

United States v. Georgetown County School District, et al., No. 2:08-cv-00889 (D.S.C. 2008) 17-18

United States v. Osceola County, No. 6:05-cv-1053 (M.D. Fla 2005) 19-21

United States v. The School Board of Osceola County, No. 6:08-cv-00582 (M.D. Fla. 2008) 17

United States v. Town of Lake Park, FL, No. 09-80507 (S.D. Fla. 2009) 15-16

Wesberry v. Saunders, 376 U.S. 1 (1964) 11

Statutes and Constitutional Provisions

Tex. Const. art. III, § 28 4

Tex. Const. art III, § 25 4

Other Authorities

Cases Under Section 2 of the Voting Rights Act, United States Department of Justice 14 n.3

Interests of *Amicus Curiae*[1]

Amicus Curiae American Civil Rights Union (ACRU) is a non-partisan 501(c)(3) tax-exempt organization dedicated to protecting the civil rights of all Americans by publicly advancing a Constitutional understanding of our essential rights and freedoms. It was founded in 1998 by long time policy advisor to President Reagan, and the architect of modern welfare reform, Robert B. Carleson. Carleson served as President Reagan's chief domestic policy advisor on federalism, and originated the concept of ending the federal entitlement to welfare by giving the responsibility for those programs to the states through finite block grants. Since its founding, the ACRU has filed *amicus curiae* briefs on constitutional law issues and election matters in cases nationwide.

The members of the ACRU's Policy Board are former U.S. Attorney General Edwin Meese III; former Assistant Attorney General for Civil Rights William Bradford Reynolds; former Assistant Attorney General for the Office of Legal Counsel Charles J. Cooper; John M. Olin Distinguished Professor of Economics at George Mason University Walter E. Williams; former Ambassador to Costa Rica Curtin Winsor, Jr.; former Ohio Secretary of State J. Kenneth Blackwell; former Voting Rights Section attorney, U.S. Department of Justice, J.

---

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus curiae* and its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

Christian Adams; former Counsel to the Assistant Attorney General for Civil Rights and former member of the Federal Election Commission Hans von Spakovsky, and former head of the U.S. Department of Justice Voting Rights Section Christopher Coates.

This case is of interest to ACRU because it is concerned with protecting the sanctity and integrity of American elections.

Summary of the Argument

The present case raises the critical but still unsettled constitutional issue of whether the one-person, one-vote principle protects the rights of voters to an equal vote, or whether election districts may be drawn to artificially award political power to individuals who are not American citizens (and may even be in the country illegally) and therefore are not eligible to vote. Appellants seek relief from the latter, the drawing of districts by Texas which resulted in a malapportionment of voters and, subsequently, a significant dilution of their vote.

Dissenting in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), Judge Kozinski supported the same position as Appellants in this case, arguing, "[T]he name by which the Court has consistently identified this constitutional right—one person, one vote—is an important clue that the Court's primary concern is with equalizing the voting power of electors [voters], making sure that each voter gets one vote—not, two, five, ten ... or one-half." 918 F.2d at 782 (internal citation omitted).

Judge Kozinski is quite right. The precedents of this Court make clear that the one-person, one-vote

doctrine protects the right of every voter to an equal vote.

Faced with the important question of whether the one-person, one-vote doctrine means that voters must have an equal vote or that each person must have a supposed equal chance to get on his representative's appointments calendar, the district court determined it was a political question that each state was free to decide on its own. In so doing, the court failed to protect the right of voters to an equally-weighted vote.

Fortunately, the data necessary to ensure that each vote is weighed equally is available and reliable. In fact, when the U.S. Department of Justice (DOJ) enforces Section 2 of the Voting Rights Act, it uses Citizen Voting Age Population ("CVAP") or otherwise considers the number of citizens. The DOJ, as a statutory designated enforcer of the Voting Rights Act, understands the importance of concentrating on the number of *citizen* voters when evaluating possible violations of the law and allegations of unequal treatment. This policy is plain on the face of redistricting case after redistricting case brought by the DOJ.

For all of these reasons, this Court should reverse the lower court decision and confirm that its one-person, one-vote principle ensures that every citizen has an equal vote.

Argument

After each decennial Census, state legislatures nationwide redraw the election districts for their state representatives as well as for each of the state's federal Congressional representatives. Well-known precedents of this Court establish the one-person, one-vote principle, which requires roughly equal numbers of voters in each district, so that every voter in a state has roughly equal voting power as far as practicable. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Simms*, 377 U.S. 533, 562 (1964); and *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970). This principle is rooted in the basic, equal right of every voter to participate in elections.

The Texas Senate Redistricting

In Texas, the legislature must reapportion the State's election districts at its first regular session after publication of the latest federal decennial Census. Tex. Const. art. III, § 28. The Texas State Constitution further provides that "[t]he State shall be divided into Senatorial Districts of contiguous territory, and each district shall be entitled to elect one Senator." Tex. Const. art. III, § 25.

The Texas Legislature first carried out these duties by passing redistricting plans for the Texas Senate, State House, and Congressional districts, signed into law by former Governor Rick Perry on June 17, 2011. After legal challenges were brought against all three redistricting plans, a three-judge panel of the United States District Court for the Western District of Texas found there was "a not insubstantial claim" that the plan for the State

Senate violated Section 5 of the Voting Rights Act. *Davis v. Perry*, 991 F. Supp. 2d 809, 817-18 (W.D. Tex. 2014). The three-judge panel consequently created Plan S172 as an interim map for the 2012 State Senate elections. *Id.* The Texas Legislature adopted Plan S172, and the Governor signed it into law on June 26, 2013. *Id.* at 818.

The Texas Legislature evaluated the redistricting plan under different metrics for measuring the population of each district. Those include (1) CVAP from the three American Community Surveys ("ACS") conducted by the U.S. Census Bureau for the 2010 decennial Census; (2) the total voter registration numbers for each district as counted by the State of Texas for 2008 and 2010; and (3) the non-suspense voter registration[2] numbers counted by Texas for 2008 and 2010. *See* Brief for Appellants at 7-8.

Theoretically "ideal," relatively equal Senate district populations were calculated based on each of the three alternative measures of district population specified above. *Id.* at 6. Shockingly, Plan S172 resulted in districts that varied from these "ideal" district populations by 46% to 55%. *Id.* at 9.

The practical result of basing Plan S172's redistricting on *total* population, not citizen population is that the votes of the residents of

---

[2] "Non-suspense voter registration" is total voter registration minus previously registered voters who fail to respond to confirmation of residence notices sent by the county voter registrar to the registered residence address of each voter.

districts with larger non-citizen populations count roughly one and a half as much as the votes of the residents of other districts. Because extensive localities in Texas include large numbers of non-citizens who cannot legally vote, Plan S172 effectively provided a political subsidy by granting more political power to areas with larger non-citizen populations and diluting the political power of areas with higher concentrations of American citizens.

The Present Litigation

In response to Appellants' challenge, the district court concluded that the choice of which population metric to use in apportioning districts should be "left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals." Jurisdictional Statement's Appendix at 13a.

Most fundamentally, the district court ruled, "the decision whether to exclude or include individuals who are ineligible to vote from an apportionment base 'involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere.'" Jurisdictional Statement's Appendix at 11a.

On the contrary, this case involves the fundamental principle of one-person, one-vote and the promise of an equal vote. The promise of an equal vote means that the states must look to the number of citizens—rather than the total number of people—when drawing legislative districts. Further, the fact that the DOJ looks to citizenship data not only enhances the propriety of the use of such data but it also exemplifies that such data is reliable and available.

I. The One-Person, One-Vote Principle Protects the Rights of Voters to an Equal Vote.

The question on appeal in the present case, i.e. what measure of population should be used for determining whether the population is equally distributed among the districts, has never been squarely addressed by this Court. Justice Thomas confirmed that in his dissent from the denial of certiorari in *Chen v. City of Houston*, 532 U.S. 1046 (2001). Justice Thomas pointed out that this Court has "never determined the relevant 'population' that States and localities must equally distribute among their districts," and, therefore, the Court has "left a critical variable in the requirement undefined." *Id.* at 1047. *ACCORD*: *Burns v. Richardson*, 384 U.S. 73, 91 (1966) (The Court has "carefully left open the question [of] what population" base is paramount for one-person, one-vote purposes); *Hadley*, 397 U.S. at 57, n.9 (same); *Chen v. City of Houston*, 206 F.3d 502, 524 (5th Cir. 2000) (Judge Garwood noted that "[t]he Supreme Court has from the beginning of this line of cases been somewhat evasive in regard to which population must be equalized"); *Garza*, 918 F.2d at 785 (Kozinski, J., concurring in part and dissenting in part).

The dilution of Appellants' votes demonstrates the consequences of this undefined gap in this Court's one-person, one-vote jurisprudence. As Justice Thomas further explained in his dissent from the denial of certiorari in *Chen*, "The one-person, one-vote principle may, in the end, be of little consequence if we decide that each jurisdiction can choose its own measure of population. But as long as

we sustain the one-person, one-vote principle, we have an obligation to explain to States and localities what it actually means." *Chen*, 532 U.S. at 1048.

The consequences of this Court not previously explaining the proper measure of population is further seen in Ninth Circuit precedent. In *Garza*, the Ninth Circuit panel majority held that the Equal Protection Clause constitutionally *required* Los Angeles County to use total Census population in redistricting, regardless of how many voters resided in each district as a result. The Ninth Circuit majority said, "[T]he people, including those who are ineligible to vote, form the basis for representative government," and, therefore, total population as counted by the Census was the "appropriate basis for state legislative apportionment." 918 F.2d at 774.

The Ninth Circuit majority ruled that basing the districts on total *voter* population would violate the Equal Protection Clause by producing "serious population inequalities across districts" which would result in "[r]esidents of the more populous districts [having] less access to their elected representative." *Id.* The panel majority further argued basing the districts on voter population would also violate the Petition Clause of the First Amendment by denying individuals access to elected officials, saying, "Interference with individuals' free access to elected officials impermissibly burdens their right to petition the government." *Id.* at 775.

But in dissent, Judge Kozinski argued that, "[T]he name by which the Court has consistently identified this constitutional right—one person, one vote—is an important clue that the Court's primary

concern is with equalizing the voting power of electors [voters], making sure that each voter gets one vote—not, two, five, ten ... or one-half." *Id.* at 782 (internal citation omitted).

Judge Kozinski explained that the Equal Protection Clause "protects a right belonging to the individual [voter] and the key question is whether the votes of some [voters] are materially undercounted because of the manner in which districts are apportioned." *Id.* He added that this right "assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of [voters] in another location." *Id.*

The issue that Judge Kozinski identifies is exactly the issue and problem in the present case before this Court. Appellants in this case allege precisely that their votes "are materially undercounted because of the manner in which districts [in Plan S172] are apportioned," and "dilution of that important right by having their vote given less weight than that of [voters] in another location." 918 F.2d at 782. Because the Senate districts in Plan S172 are based on total population, rather than on citizens that have the right to vote, the weight of voters in some Senate districts (with more non-citizen residents that cannot vote) counts roughly one and a half times as much as the vote of Appellants in their districts.

That problem would be solved if the Senate districts at issue in this case were apportioned based on equal numbers of citizens, rather than equal numbers of total population. That would be

consistent with the one-person, one-vote principle, as it would protect the right of all voters in the state to an equal vote with the same weight. As Judge Kozinski rightly explains, "at the core of one person one vote is the principle of electoral equality, not that of equality of representation." *Id.*

Amicus agrees with Justice Thomas and Judge Kozinski that the constitutional right protected by the one-person, one-vote principle is the right to an equal vote of the same weight as all other voters, rather than a right of equal access to representation. The degree of access a legislature may wish to give residents is much more the character of a political question compared to this Court's Constitutionalized one-person one-vote jurisprudence. As Judge Kozinski said, that is why the principle is called "one-person, one-vote." There is no evidence in the present case that districts of equal voters, rather than equal population, would leave non-citizens with any less effective access to their district's Senator, which would be an implausible claim on its face.

II. This Court's Precedents Protect the Right of Every Voter to an Equal Vote.

While this Court has never definitively resolved which population data the principle of one-person, one-vote applies to, the precedents of this Court make clear that the doctrine protects the right of every voter to an equal vote.

Central to the issue before the Court is *Reynolds v. Sims*. In it, this Court announced that "all who participate in [an] election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income,

and wherever their home may be...." 377 U.S. at 557-58.

This Court added in *Hadley* that the Equal Protection Clause "requires that each qualified voter must be given an equal opportunity to participate in that election." 397 U.S. at 56. Consequently, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote proportionally for equal numbers of officials." *Id. See also, Reynolds*, 377 U.S. at 568.

As *Reynolds* explained, the Equal Protection Clause protects "the right of all qualified citizens to vote." 377 U.S. at 554. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Id.* (quoting *Wesberry v. Saunders*, 376 U.S. 1, 17 (1964)). A citizen, therefore, "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972). As this Court noted further in *Greg v. Sanders*, 372 U.S. 368, 380 (1963), "The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions."

Reynolds further explained that "[w]ith respect to the allocation of legislative representation, all voters, as citizens of a state, stand in the same relation regardless of where they live." 377 U.S. at 565. "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when

compared with the votes of citizens living in [other] parts of the State." *Id.* at 568. Judge Kozinski summarizes, "References to the personal nature of the right to vote as the bedrock on which the one person one vote principle is founded appear in the case law with monotonous regularity." *Garza*, 918 F.2d at 782 (Kozinski, J., concurring in part and dissenting in part).

Gaffney v. Cummings, 412 U.S. 735, 746 (1973) explained the principle in the way most relevant to the question at issue in this case, saying, "[T]otal population...may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because 'census persons' are not voters."

Just as this Court ended the artificial political subsidy to rural voters in *Reynolds*, so should it end the artificial political subsidy to those voters who live in areas with dense concentrations of non-citizens.

The decision of the district court below declined to follow the above long line of precedents of this Court, and the practice of the DOJ, below, which protect the right of *citizens* to an equal vote. The court below said whether the doctrine of so-called one-person, one-vote protected the right of citizens to an equal vote, or the right of total population to supposed equal chances to get on their representative's appointments calendar, was a political question that each state was free to decide on its own.

This Court has recognized that, typically, "'[w]hen a State exercises power wholly within the

domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.'" *Reynolds*, 377 U.S. at 566 (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960)).

As the *Reynolds* Court explained:

> We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.

377 U.S. at 566.

Indeed, the doctrine of one-person, one-vote logically grows directly out of the right to vote itself. The equal right of all to vote logically gives rise to the right of all to an equal vote. This Court in enforcing one-person, one-vote is just enforcing the equal right of all to vote.

This logic can be seen at the root of the rise of one-person, one-vote in *Baker v. Carr*, 369 U.S. 186.

This Court in that landmark case effectively rejected the district court's political question doctrine in finding that the Plaintiffs in that case had standing as "*voters* of the state of Tennessee" and that "*voters* who allege facts showing disadvantage to themselves as individuals have standing to sue." *Id.* at 204, 206 (emphasis added). This Court consequently found that the apportionment challenge of the Tennessee voters was "justiciable, and if 'discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.'" *Id.* at 209-10 (quoting *Snowden v. Hughes*, 321 U.S. 1, 11 (1944)). This ruling on this reasoning logically forecloses the political question abdication of the district court below. Appellees make arguments not unlike those advanced by Tennessee and Alabama before this Court rejected them in *Baker* and *Reynolds*.

III. The Department of Justice Uses Citizens Voting Age Population in its Enforcement of the Voting Rights Act.

The logic of the one-person, one-vote principle and this Court's precedents, above, are the reason why redistricting and other suits brought by the DOJ under Section 2 of the Voting Rights Act[3] have been based on Citizen Voting Age Population

---

[3] All cases brought under Section 2 of the Voting Rights Act, with the complaints and other documents linked, are listed at the DOJ website under "Cases Raising Claims Under Section 2 of the Voting Rights Act," http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php#osceola_school.

(CVAP), or otherwise focused on the rights of citizens who can vote, or on "voters."

When the DOJ brings a case pursuant to Section 2 of the Voting Rights Act, there are three so-called preconditions that it must show are present. *See Thornburgh v. Gingles*, 478 U.S. 30 (1986). The first *Gingles* precondition is that the minority group "is sufficiently large and geographically compact to constitute a majority in a single member district." *Id.* at 50-51. To establish this precondition, the DOJ explicitly turns to CVAP. Below are examples of this use.

1. *United States v. Town of Lake Park*

In its Complaint, the DOJ alleged "Plaintiff challenges the at-large method of electing the Town of Lake Park Commission on the grounds that it dilutes the voting strength of black *citizens* in violation of Section 2...." Complaint at 1, *United States v. Town of Lake Park, FL*, No. 09-80507 (S.D. Fla. 2009) (emphasis added), and thus the first *Gingles* precondition was satisfied. *See Gingles*, 478 U.S. 30, 50-51.

Indeed, as the foundation for the remedy sought, the Complaint further alleged, "The black population of the Town is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant Commission can be drawn in which black persons would constitute a majority of the total population, voting age population, and *citizen voting age population* in at least one district." Complaint at 3, *United States v. Town of Lake Park, FL* (emphasis added).

The Cause of Action section of the Complaint alleged, "the at-large method of electing the Commission has the effect of diluting black voting strength, resulting in black *citizens* being denied an opportunity equal to that afforded to other members of the electorate," and "Unless enjoined by order of this Court, Defendants will continue to conduct elections for the Commission under the present method of election that denies black *citizens* the opportunity to participate equally with white *citizens*...." *Id.* at 4 (emphasis added).

2. *United States v. Euclid City School District Board of Education*

The DOJ's lawsuit here reveals its policy on which population group should be used in Section 2 lawsuits involving legislative districts. The Complaint alleged, "The at-large method of electing the Euclid Board of Education dilutes the voting strength of African-American *citizens*, in violation of Section 2 of the Voting Rights Act...." Complaint at 2, *United States v. Euclid City School District Board of Education, OH*, No. 1:08-cv-02832 (N.D. Ohio 2008) (emphasis added). To satisfy the first *Gingles* precondition, the DOJ alleged, "The African-American population of Euclid is sufficiently numerous and geographically compact that a properly apportioned five single-member district plan . . . can be drawn in which African-Americans would constitute a majority of the total population and *voting age population* in one district." *Id.* at 3.

The Cause of Action section of the Complaint alleged, "the at-large election system for electing Defendant Euclid City School District Board of

Education...result[s] in African-American *citizens* being denied an opportunity equal to that afforded to other members of the electorate...." and "Unless enjoined by order of this Court, Defendants will continue to conduct elections for the Euclid City School District Board of Education under the present method of election that denies African-American *citizens* the opportunity to participate equally with white *citizens*...." *Id.* at 4 (emphasis added).

3. *United States v. The School Board of Osceola County*

In that Complaint, the DOJ alleged, "The Hispanic population of the county is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the School Board can be drawn in which Hispanic persons would constitute a majority of the *citizen voting-age population* in one out of five districts." Complaint at 3-4, *United States v. The School Board of Osceola County*, No. 6:08-cv-00582 (M.D. Fla. 2008) (emphasis added).

4. *United States v. Georgetown County School District, et. al.*

The DOJ Complaint alleged, "The African-American population of the county is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant Board can be drawn in which black *citizens* would constitute a majority of the total population, and voting age population in three districts." Complaint at 3, *United States v. Georgetown County School District, et. al.*, No. 2:08-cv-00889 (D.S.C. 2008) (emphasis added). The Cause

of Action section of the brief seeks relief against practices "resulting in African-American *citizens* being denied an opportunity equal to that afforded to other members of the electorate to participate in the political process and elect representatives of their choice...." *Id.*at 5 (emphasis added). Yet again, the DOJ affirmed that citizenship data is the proper data set to be used in determining liability under the first *Gingles* precondition.

5. *United States v. City of Euclid, et al.*

An earlier DOJ Complaint alleged that "the at-large/ward method of electing the Euclid City Council dilutes the voting strength of African-American *citizens*, in violation of Section 2 of the Voting Rights Act...." Complaint at 1, *United States v. City of Euclid, et al.*, No. 1:06-cv-01652 (N.D. Ohio 2006) (emphasis added). The Complaint further alleged that "The African-American population of the City of Euclid is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant City Council can be drawn in which black *citizens* would constitute a majority of the total population, and voting age population in two districts." *Id.* at 3 (emphasis added). The Cause of Action section of the Complaint seeks relief from practices "resulting in African-American *citizens* being denied an opportunity equal to that afforded to other members of the electorate to participate in the political process and elect representatives of their choice, in violation of Section 2 of the Voting Rights Act." *Id.* at 4 (emphasis added).

6. *United States v. City of Boston*

The DOJ Complaint in this matter was based explicitly on "*citizen voting age population*." The Second Cause of Action alleges, "Defendants' conduct has had the effect of denying limited English proficient Hispanic and Asian American *voters* an equal opportunity to participate in the political process and to elect candidates of their choice on an equal basis with other citizens in violation of Section 2 of the Voting Rights Act." Complaint at 6, *United States v. City of Boston, MA*, No. 05-11598 (D. Mass. 2005) (emphasis added).

The Prayer for Relief section of the Complaint sought relief "to ensure that Spanish-speaking *citizens* are able to participate in all phases of the electoral process," and to prevent Boston "from implementing practices and procedures that deny or abridge the rights of limited English proficient Hispanic and Asian American *citizens* in violation of Section 2 of the Voting Rights Act." *Id.* at 7 (emphasis added). The Prayer for Relief also sought an injunction "[r]equiring Defendants to devise and implement a remedial program that provides Boston's limited English proficient Hispanic and Asian American *citizens* the opportunity to fully participate in the political process consistent with Section 2 of the Voting Rights Act." *Id.* at 7-8 (emphasis added).

7 *United States v. Osceola County*

The DOJ alleged, "In conducting elections in Osceola County, Defendants have failed to ensure that all Hispanic *citizens* with limited-English proficiency have an equal opportunity to participate

in the political process and to elect the representatives of their choice," and "The effects of discrimination on Hispanic *citizens* in Osceola County, including their markedly lower socioeconomic conditions relative to white *citizens*, continue to hinder the ability of Hispanic *citizens* to participate effectively in the political process in county elections." Complaint at 4, *United States v. Osceola County*, No. 6:05-cv-1053 (M.D. Fla 2005) (emphasis added).

The Complaint specifically alleged, "Upon information and belief, a majority of Board members in 1994-96 recognized that the growth of the Hispanic population would result in Hispanic voters achieving the ability to elect a candidate of their choice in one or more districts under the single-member district method of election," and "In 1996, a Hispanic candidate ran in Board of Commissioners District One, and was elected to the Board under the single-member district method of election." *Id.* at 5-6.

The Complaint explained, "In 2001, the Board of Commissioners appointed a redistricting committee to redistrict the county's residency districts. Commissioners expressed concern about the possibility they would be forced to change their method of election in the future, and the residency district plan was adopted with this concern in mind." *Id.* at 6. The Complaint added, "The residency districts adopted by the Board in 2001 split heavily Hispanic population concentrations." *Id.* Consequently, the Complaint alleged that the method for electing the Board "has the effect of diluting Hispanic voting strength, resulting in

Hispanic *citizens* ... having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice, in violation of Section 2." *Id.* at 6-7 (emphasis added).

8. *United States v. Alamosa County*

The DOJ Complaint alleged, "The current at-large method of electing the members of the Alamosa County Board of Commissioners violates Section 2 of the Voting Rights Act, because it results in Hispanic *citizens* of the county having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice...." Complaint at para. 16, *United States v. Alamosa County*, No. 01-B-2275 (D. Colo. 2001) (emphasis added).

9. *United States v. Crockett County*

The Complaint alleged that the districting plan for the election of members of the County Board of Commissioners "violates Section 2 of the Voting Rights Act because it results in black *citizens* of the county having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." Complaint at 3, *United States v. Crockett County*, No. 1-01-1129 (W.D. Tenn. 2001) (emphasis added). The Complaint further alleged, "The black population of Crockett County is sufficiently numerous and geographically compact that a properly apportioned multi-member district plan for electing the defendant Board of Commissioners can be drawn in which black voters would constitute an

effective majority in two districts out of twelve." *Id.* at 2.

10. *United States v. Charleston County*

The DOJ Complaint alleged a violation of Section 2 because "the at-large election system for electing the Charleston County Council has the effect of diluting black voting strength, resulting in black *citizens* being denied an opportunity equal to that afforded to other members of the electorate to participate in the political process and elect representatives of their choice." Complaint at 4, *United States v. Charleston County*, No. 2-01-0155 (D.S.C. 2001) (emphasis added). The Complaint specifically alleged, "The black population of Charleston County is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the Defendant County Council can be drawn in which black *citizens* would constitute a majority of the total population, voting age population, and registered voters in three districts." *Id.* at 3 (emphasis added).

Thus, it is clear that the DOJ, as the designated chief enforcer of the Voting Rights Act, concentrates on the numbers of eligible *citizen* voters when evaluating possible violations of the law and allegations of unequal treatment. The DOJ has plainly used citizenship data in redistricting case after redistricting case, voting case after voting case.

Conclusion

For all of the foregoing reasons, *Amicus Curiae* American Civil Rights Union respectfully submits that this Court should reverse the lower court decision and confirm that its one-person, one-vote principle ensures that every citizen has an equal vote, and thus, requires the use of citizen population when drawing legislative districts.

Respectfully submitted,

Kaylan L. Phillips
Counsel of Record
PUBLIC INTEREST LEGAL FOUNDATION
209 W. Main Street
Plainfield, IN 46168
(317) 203-5599
kphillips@publicinterestlegal.org
Counsel for Amicus Curiae
American Civil Rights Union

August 5, 2015

Supreme Court, U.S.
FILED
SEP 25 2015
OFFICE OF THE CLERK

No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, ET AL.,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF AMICUS CURIAE THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW IN SUPPORT OF APPELLEES AND AFFIRMANCE

WENDY R. WEISER
MICHAEL C. LI
THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(646) 292-8310
wendy.weiser@nyu.edu

SIDNEY S. ROSDEITCHER
Counsel of Record
ROBERT A. ATKINS
PIETRO SIGNORACCI
ELIZABETH M. GARY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
srosdeitcher@paulweiss.com

Counsel for Amicus Curiae

September 25, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. USE OF TOTAL POPULATION FOR APPORTIONMENT IS ROOTED DEEPLY IN THE NATION'S HISTORY AND ITS CONSTITUTIONAL VALUES AND PRACTICES 6

A. The Framers and the Drafters of the Fourteenth Amendment Chose Total Population as the Apportionment Base Most Consistent with Representative Democracy 6

B. Congress Repeatedly Rejected the Exclusion of Non-Citizens or Other Nonvoters from the Apportionment Base ... 15

C. Congress Required Total Population-Based Apportionment in Acts Regulating Territories and the Admission of New States 20

D. Most State Constitutions Required Apportionment on the Basis of Total Population Prior to the 1960s Reapportionment Cases, and Nearly All States Have Adopted Some Form of Total Population Apportionment Since 22

II. APPORTIONMENT BASES OTHER THAN TOTAL POPULATION HAVE BEEN WIDELY MANIPULATED FOR DISCRIMINATORY PURPOSES 25

A. Idaho 25

B. New York 26

C. Massachusetts 27

D. The Southern States 29

E. California 31

F. Hawaii 32

III. TOTAL POPULATION SHOULD BE THE PRESUMPTIVE APPORTIONMENT BASE 33

A. Apportionment Based on Total Population Fully Satisfies Equal Protection 35

B. *Burns* v. *Richardson* Does Not Support Voter-Based Apportionment 37

CONCLUSION 41

APPENDIX

Chart: State Apportionment Practices Under Constitutions Enacted 1776-1920 ..... 1a

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Ariz. State Legis. v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) 5

Baker v. *Carr*, 369 U.S. 186 (1962) 35

Burns v. *Richardson*, 384 U.S. 73 (1966) ..... *passim*

Fed'n for Am. Immigration Reform v. *Klutznick*, 486 F. Supp. 564 (D.D.C. 1980) 19

Fletcher v. *Lamone* , 831 F. Supp. 2d 887 (D. Md. 2011) 24

Gray v. *Sanders*, 372 U.S. 368 (1963) 35, 36

Kilgarlin v. *Martin*, 252 F. Supp. 404 (S.D. Tex. 1966) 30

Kirkpatrick v. *Preisler*, 394 U.S. 526 (1969) 37

Klahr v. *Goddard*, 250 F. Supp. 537 (D. Ariz. 1966) 23

NLRB v. *Noel Canning*, 134 S. Ct. 2550 (2014) 2, 4, 5

Reynolds v. *Sims*,
377 U.S. 533 (1964) ..... *passim*

The Pocket Veto Case, 279 U.S. 655 (1929) 5

Terrazas v. *Clements*,
581 F. Supp. 1319 (N.D. Tex. 1983) 30

Wesberry v. *Sanders*,
376 U.S. 1 (1964) ..... *passim*

Wood v. *Brom*,
287 U.S. 1 (1932) 19

STATUTES

An Act to provide a government for the Territory of Hawaii, ch. 339, 31 Stat. 141 (1900) 32

Apportionment Act of 1872, 17 Stat. 28 15

Cal. Const. of 1850 31

Cal. Const. of 1879 ..... 31, 32

Chinese Exclusion Act of 1882, Pub. L. No. 47-71, 22 Stat. 58 (1882) 31

Const. Am. XIV ..... *passim*

Const. Art. I, S. 2 ..... 2, 8, 12, 36

H.R. Rep. No. 2079 (1909) 22

H.R. Rep. No. 56-305 (1900) 32

Northwest Ordinance of 1787 20

OTHER AUTHORITIES

1-7 Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the State, Territories, and Colonies Now Or Heretofore Forming the United States of America* (1909) 20, 21

1 Herbert J. Storing et al., *The Complete Anti-Federalist* 17 (1981) 10

1 *Proceedings and Debates of the Constitutional Convention of Idaho, 1889,* (I.W. Hard ed., 1912)..... 26

36th Cong., 2d Sess. App. 749 (1842) 9

39th Cong., 1st Sess. 10 (1865) 12

39th Cong., 1st Sess. 141 (1866)..... 12

39th Cong., 1st Sess. 2767 (1866)..... 14

39th Cong., 1st Sess. 359 (1866)..... 13

42nd Cong., 2d Sess. 141 (1871) 15

61 Cong. Rec. 6339 (1921)..... 16

70 Cong. Rec. 699 (1928)..... 17

71 Cong. Rec. 1907 (1929)..... 18

71 Cong. Rec. 1912 (1929)..... 19

Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* (1914) 13

Charles W. Eagles, *Democracy Delayed: Congressional Reapportionment and Urban-Rural Conflict in the 1920s* (1990) 16, 18, 19

Christopher St. John Yates, *A House of Our Own or A House that We've Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 Colum. J.L. & Soc. Probs. 157 (1992) 9

Constitution of the State of New York (Nathaniel H. Carter et al. eds., 1821) 26

David E. Kyvig, *Explicit and Authentic Acts: Amending the Constitution* (1996) 9

Douglas Keith and Eric Petry, *Apportionment of State Legislatures, 1776-1920* 23, 25, 1a

Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 Cal. L. Rev. 61 (1947) 31

Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (1988) 15

Eric Foner, *The Story of American Freedom* (1998) 7

George D. Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 Fordham L. Rev. 93 (1961) 12

Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (1969) 6

John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 Tex. Tech. L. Rev. 1089 (1995) 30

John V. H. Dippel, *Race to the Frontier: "White Flight" and Westward Expansion* (2005) 30

John Adams, *Thoughts on Government* Apr. 1776 Papers 8

Joseph H. Groberg, *The Mormon Disfranchisements of 1882 to 1892* 25

Official Report of the Debates and Proceedings in the State Convention: assembled May 4, 1853, to revise and amend the constitution of the commonwealth of Massachusetts (Harvey Fowler ed., 1853) 28

Robert B. McKay, *Reapportionment: The Law and Politics of Equal Representation* (1965) ..... *passim*

Robert G. Dixon, *Democratic Representation: Reapportionment in Law and Politics* (1968) 22–23

Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government* (1930) 29

Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* (1997) 31

Stephen Ansolabehere, et al., *The End of Inequality: One Person, One Vote and the Reshaping of American Politics* (2008) 34

Stephen Ansolabehere, et al., *Equal Votes, Equal Money: Court Ordered Redistricting and Public Expenditures* 96 Am. Pol. Sci. Rev. 767 (2002) 34

Steven Taylor, *Progressive Nativism: The Know-Nothing Party in Massachusetts* 28 Hist. J. Mass. 167 (2000) 29

Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 585 n.199 (1996) 32

INTEREST OF AMICUS[1]

Amicus curiae the Brennan Center for Justice at N.Y.U. School of Law (the "Brennan Center") is a not-for-profit, non-partisan think tank, and public interest law institute that seeks to improve systems of democracy and justice. It was founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to protect the right to vote and to prevent manipulation of electoral rules. The Brennan Center conducts empirical, qualitative, historic, and legal research on redistricting and electoral practices and has participated in a number of redistricting and voting rights cases before this Court.

The Brennan Center takes an interest in this case because a ruling in favor of Appellants would undermine the rights of voters and residents of Texas, especially already underrepresented racial and ethnic minorities, and would violate the established principle of equal representation for equal numbers of people.

---

[1] This brief *amicus curiae* is filed with the consent of all parties. Counsel for the Brennan Center affirm, pursuant to Supreme Court Rule 37.6, that no counsel for any party authored this brief in whole or in part, and that no party, counsel for any party, or any other person other than *amicus* and its counsel made a monetary contribution intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of N.Y.U. School of Law.

SUMMARY OF ARGUMENT

Apportionment based on total population not only is consistent with the Equal Protection Clause, but is deeply embedded in our Constitution, our Nation's history, and the longstanding actual practice of Government. *See NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2578 (2014). It gives life to the principles and values of equal representation that the Framers declared essential to representative democracy and that the Fourteenth Amendment commands to ensure a government of and for the people.

These values are deeply rooted in our constitutional heritage. The Framers believed that legislatures should be a portrait of the people "in miniature" and chose in Article I, Section 2 to apportion congressional seats among the states by "the whole number of free persons . . ." in each state. Congress built on Article I, Section 2 and made population the basis for apportionment of all but four of the territorial legislatures it created and for almost all of the conventions it called to draft constitutions for new states.

After the Civil War, the Reconstruction Congress—after extended debate over apportionment—embraced total population when it wrote the Fourteenth Amendment, mandating that "Representatives shall be apportioned among the several states according to their respective *numbers*, counting the *whole number of persons* in each State . . ." (emphasis added).

The history of apportionment in the states is equally clear. After the Revolution, states embraced the Framers' principle of "no taxation without representation" and, with limited exception, chose to base representation in their legislatures on equality of inhabitants rather than equality of voters—a trend that became almost universal after the Civil War. Only 17 of 123 state constitutions between 1776 and 1920 apportioned legislatures based on voters or votes cast, and today, some form of total population is the basis for apportionment of all state legislatures.

The rare uses of voter apportionment bases almost always reflected efforts to disadvantage unpopular or disfavored groups. Through manipulation of apportionment rules, politically dominant groups of the day were able to deny equal representation to parts of states where African Americans in the South, Irish-Americans in Massachusetts, Mormons and Chinese in the Nation's western territories, and immigrants in New York City lived. That troubling history teaches why for 200 years the overwhelming practice, and the now settled constitutional tradition, is apportionment based on population.

Appellants claim this case presents a constitutional question of first impression, but history shows that the issue—who should count for purposes of apportioning representation—is neither new nor in need of rethinking. Debates over apportionment occurred throughout the Nation's history. As in this case, those debates more often than not were driven by the country's rapidly

changing demographics. Whenever those debates took place, they almost always came back to the same place: representative democracy is best achieved by representation based on population.

This Court's reapportionment cases are part of, and embrace, that history and firmly establish that total population always satisfies the Equal Protection Clause. This Court also has expressed a deep skepticism about the appropriateness of voter-based apportionment in light of its vulnerability to manipulation.

This Court should affirm the district court judgment and declare total population the presumptive basis for apportionment.

ARGUMENT

The question of how to ensure fair representation for all people has long been central to American political life. Debates over apportionment by the Framers and by lawmakers since, at both the state and federal levels, have been vigorous and often contentious. Out of those debates, the clear consensus is that the goal of representative democracy is best served by apportionment based on "numbers" of "persons" rather than voters.

As this Court explained, the Constitution must be construed "in light of its text, purposes, and our whole experience as a Nation," and informed by "the actual practice of Government." *Noel Canning*, 134 S. Ct. at 2578 (looking to historical practices to help decide the meaning of the recess appointments clause) (internal quotation marks omitted). In this

analysis, the Court has said "*we put significant weight upon historical practice.*" *Id.* at 2559; *see also The Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions."). These practices illuminate the Constitution's values and guide application of its principles, particularly on "doubtful question[s] . . . on which human reason may pause." *Noel Canning*, 134 S. Ct. at 2559 (quoting *McCulloch* v. *Maryland*, 17 U.S. 316, 401 (1819)); *see also Ariz. State Legis.* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673–5 (2015).

The text, history and purpose of the Constitution's provisions addressing apportionment and centuries of government practice all confirm that apportionment based on total population best satisfies the Constitution's vision of representative democracy and the guarantee of equal protection to all persons.

I. USE OF TOTAL POPULATION FOR APPORTIONMENT IS ROOTED DEEPLY IN THE NATION'S HISTORY AND ITS CONSTITUTIONAL VALUES AND PRACTICES

A. The Framers and the Drafters of the Fourteenth Amendment Chose Total Population as the Apportionment Base Most Consistent with Representative Democracy

Debates over representation were central to the drafting of the Constitution and the Fourteenth Amendment. Each time, those debates affirmed the importance of equal representation for equal numbers of people as a core constitutional value.

1. The Founding Era and the Constitutional Convention

The Framers' views on equal representation were influenced by maladies that afflicted the British system. Many parliamentary districts had grown large and unwieldy, while others scarcely had any people. Other places, like the American colonies and Ireland, had no representation at all. This mattered little under the British belief in "virtual representation." Equality of actual representation was of no concern because "the English people, despite great degrees of rank and property, despite even the separation of some by three thousand miles of ocean, were essentially a unitary homogeneous order with a fundamental common interest." Gordon S. Wood, *The Creation of the American Republic, 1776-1787* 174 (1969).

The founding generation rejected virtual representation, which for them meant "taxation without representation." When it came time to draft the Nation's new Constitution, ensuring effective actual representation was among the major topics debated—and resolved—by the Framers. Robert B. McKay, *Reapportionment: The Law and Politics of Equal Representation* 16 (1965).

The debate focused on ensuring representation for all people, not just the select class of voters. For the Framers, voting was a separate topic—a privilege to be limited to those with sufficient independence to act in the best interest of the community. Eric Foner, *The Story of American Freedom* 18–20 (1998). Such political independence could come only with financial independence. *Id.* at 18–19. Thus, most states maintained some form of property requirements for voting, and even the most democratic and egalitarian of post-Revolution constitutions, like Pennsylvania's, contained taxpaying requirements that disenfranchised "mainly paupers and domestic servants." *Id.* at 16.

Representation, however, was not so restricted. The revolutionary cry of "no taxation without representation" was not about making sure the small numbers of voters were represented, but making sure the sentiment of communities—voters and nonvoters alike—was reflected in legislative bodies. This led to protracted debate over how to allocate congressional representation among states and, after that issue was resolved, over the proper size of congressional districts. James Madison called this question the most "worthy of attention" in the

entire Constitution. The Federalist No. 55 (James Madison).

John Adams had written that a representative assembly "should be in miniature, an exact portrait of the people at large. It should think, feel, reason and act like them." John Adams, *Thoughts on Government* Apr. 1776 Papers 4:86-93. James Wilson echoed Adams' sentiments at the Constitutional Convention: "The Legislature ought to be the most exact transcript of the whole Society." 1 *Records of the Federal Convention of 1787* 142 (Max Farrand ed., 1911) [hereinafter Farrand]. George Mason stressed: "Reps. should sympathize with their constituents; shd. think as they think, & feel as they feel." *Id.* at 134.

Wilson explained that seats in the popularly elected house of the new Congress should be apportioned by numbers of people, not voters: "equal numbers of people ought to have an equal number of representatives." *Id.* at 179. Under Article I, Section 2, even indentured servants, who were not entrusted with the vote, would count. Slaves also would count, albeit only as fractions of persons because of the Three-Fifths Compromise.

But it was not enough to have apportionment based on numbers. The danger of Congress becoming unrepresentative due to the size of districts also worried the Framers. If districts had too many people, delegates worried that representatives would "not possess a proper knowledge of the local circumstances of their numerous constituents" and might lack sympathy "with the feelings of the mass

of the people." The Federalist No. 55 (James Madison).

These concerns prompted George Washington to propose that the population of districts be decreased from 40,000 persons to 30,000—the only occasion where, as chair, he addressed the convention on a substantive issue. Christopher St. John Yates, *A House of Our Own or A House that We've Outgrown? An Argument for Increasing the Size of the House of Representatives*, 25 Colum. J.L. & Soc. Probs. 157, 175–76 n.112 (1992). Madison attempted to address these concerns with a proposed amendment to increase the size of the House as population grew. David E. Kyvig, *Explicit and Authentic Acts: Amending the U.S. Constitution* 470 (1996).[2]

For Madison, representation for all people (rather than just voters) was paramount, as he repeatedly discussed in the Federalist Papers. Representation of all persons would guarantee that "the inhabitants" of the Nation would "find sufficient inducements of interest to become willing parties to the [federal government]." The Federalist No. 43 (James Madison).

---

[2] These concerns would be echoed when Congress passed the Apportionment Act of 1842, which ended the unrepresentative practice in some states of at-large congressional elections. As Sen. William Graham of North Carolina explained, single-member districts would guarantee the "personal and intimate acquaintance between the representative and constituent which is of the very essence of true representation." Cong. Globe, 36th Cong., 2d Sess. app. 749 (1842).

Even Anti-Federalist writers agreed. In the *Federal Farmer*, Melancton Smith called for: "A full and equal representation . . . which possesses the same interests, feelings, opinions and views the people themselves would were they all assembled." 1 Herbert J. Storing et al., *The Complete Anti-Federalist* 17 (1981).

In the end, with "full and equal" representation as the common goal, the Framers all came to the same conclusion: "Numbers . . . 'are the only proper scale of representation.'" *Wesberry* v. *Sanders*, 376 U.S. 1, 15 (1964) (quoting The Federalist No. 54 (James Madison)).

2. The Fourteenth Amendment

Eight decades later, drafters of the Fourteenth Amendment resumed the apportionment debate in the new light of abolition. Faced with millions of Americans freed from slavery and the Confederate states returned to the Union, the drafters considered using voters, citizens and total population for apportionment. Again, the debate settled on total population. For President Lincoln, government was truly representative only if it accounted for—and was accountable to—all of its constituents. As this Court would explain a century later, that is what Lincoln meant when he recommitted the reborn Nation to a "government of the people, by the people, for the people." *Reynolds*, 377 U.S. at 567–68.

The concept that all people should count had deep roots for Lincoln. A decade earlier in the midst of the nativist "Know-Nothing" movement that roiled

American politics of the 1850s and destroyed the Whig Party, Lincoln warned:

> As a nation, we began by declaring that *'all men are created equal.'* We now practically read it, 'all men are created equal, *except negroes.*' When the Know-Nothings get control, it will read 'all men are created equal, except negroes, *and foreigners, and catholics.*'

2 *The Collected Works of Abraham Lincoln* 322–23 (Roy P. Basler ed., 1953).

As Sen. Henry Cabot Lodge later explained, representation for Lincoln was not about representing voters, but all the people:

> [R]epresentative government rests upon certain broad principles in regard to which Lincoln spoke clearly and decisively. The basic theory of representative government is that the representative body represents *all the people*, and that a majority of that body represents a majority of *all the people*.

The Democracy of Abraham Lincoln: Address before the students of Boston University School of Law 9 (Mar. 14, 1913) (emphasis added).

While representation for all was foremost in the minds of Lincoln and his contemporaries, the Reconstruction Congress was wary of the potential political imbalance the Civil War had created. Section 2 of the Fourteenth Amendment was shaped by a paradox of abolition: the recently rebellious

states would see their representation in the House increase as the population of former slaves began counting as 5/5 instead of 3/5 for apportionment purposes, even while those states denied the vote to African Americans.

To avoid that injustice, some in Congress proposed to change the apportionment base from total population to citizens or voters. *See* Cong. Globe, 39th Cong., 1st Sess. 10 (1865) (statement of Rep. Thaddeus Stevens) (suggesting apportionment "among the States . . . according to their respective legal voters"); *cf.* Cong. Globe, 42nd Cong., 2d Sess. 407 (1872) (explaining Stevens's belief that using voters would encourage states to enfranchise African Americans). Representatives of New England states, however, objected to the proposed "legal voters" formula because their region had large numbers of immigrants and higher percentages of women (due to the migration of men to the West). George D. Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment,* 30 Fordham L. Rev. 93, 95 (1961). Others feared that departure from total population would lead to political mischief and manipulation: "an unseemly scramble in all the States during each decade to increase by every means the number of voters," including by extending suffrage to women and aliens. Cong. Globe, 39th Cong., 1st Sess. 141 (1866) (statement of Rep. James Blaine).

Many argued that total population should be retained for the same reasons the Framers selected it in Article I, Section 2. Blaine, for example, called population "the true basis of representation" and

argued that "women, children, and other nonvoting classes may have as vital an interest in the legislation of the country as those who actually deposit a ballot." *Id.*

A subsequent draft of the Fourteenth Amendment apportioned representation instead on the "whole number of citizens." Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction* 50–51 (1914). But Rep. Roscoe Conkling of New York proposed substituting "persons" for "citizens." *Id.* at 52. He explained:

> 'Persons,' and not 'citizens,' have always constituted the basis . . . . I believe it a wise and salutary provision, a solid block needed in the foundation of our structure.

Cong. Globe, 39th Cong., 1st Sess. 359 (1866). Conkling also expressed concern about the negative effect that a "citizen" apportionment base would have on states with large "alien" populations, noting the "considerable inequalities in this respect, because the number of aliens in some States is very large and growing larger." *Id.* Conkling's amended language was adopted. Kendrick, *supra*, at 52.

In addressing another version of the amendment, Sen. Jacob Howard of Michigan argued that since "an unequal distribution of voters" would lead to an "inequality" of representation, the "theory of the Constitution" required that the number of all persons remain the basis of apportionment:

> Nor did the committee adopt the principle of making the ratio of representation depend upon the number of voters, for it so happens there is an unequal distribution of voters in the several States, the old States having proportionally fewer than the new States. It was desirable to avoid this inequality in fixing the basis. The committee adopted numbers as the most just and satisfactory basis and this is the principle upon which the Constitution itself was originally framed, that *the basis of representation should depend on numbers; and such, I think, after all, is the safest and most secure principle upon which Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution.*

Cong. Globe, 39th Cong., 1st Sess. 2767 (1866) (emphasis added). Sen. George Edmunds agreed total population was necessary to preserve "the *original principle* that all society in some form is to be represented in a republican Government." *Id.* at 2944 (emphasis added).

The final version of the Fourteenth Amendment, approved by the Senate in June 1866, required apportionment based on total population. *Id.* at 2991. To satisfy concerns that some provision was needed to induce former rebel states to enfranchise African Americans, the second sentence of Section 2 provided that a state's representation

would be reduced in the same proportion as male inhabitants aged 21 were denied the vote. *See* Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 252–53 (1988).

B. Congress Repeatedly Rejected the Exclusion of Non-Citizens or Other Nonvoters from the Apportionment Base

Soon after passage of the Fourteenth Amendment, Congress passed the Apportionment Act of 1872, which built on the Fourteenth Amendment's apportionment of representation among the states by requiring that each congressional district within a state contain "as nearly as practicable an equal number of inhabitants." § 2, 17 Stat. 28.

Passage of the law was uncontroversial. The sole objection was made by Rep. William R. Stoughton, who argued unsuccessfully that fast-growing states like his should have the flexibility to underpopulate districts to take into account expected future growth. Cong. Globe, 42nd Cong., 2d Sess. 141 (1871).

Later, mass immigration from southern and eastern Europe would cause Congress to revisit the question of who should "count" in apportionment. Although immigration had always been a facet of American life, a large influx of immigrants arrived in America at the end of the nineteenth century, with the number growing from five million arrivals between 1881 and 1890 to nearly nine million between 1901 and 1910. McKay, *supra*, at 26. This

immigration boom, combined with the fact that immigrants increasingly settled in cities rather than on the frontier, rekindled debate about allocation of legislative power. *Id.*

In 1921, Rep. William Vaile of Colorado proposed to change apportionment laws to prevent a decrease in the number of seats of "more distinctly American population." 61 Cong. Rec. 6339 (1921); *see also* Charles W. Eagles, *Democracy Delayed: Congressional Reapportionment and Urban-Rural Conflict in the 1920s* 50 (1990). Vaile argued that the Fourteenth Amendment had been drafted at a time when the number of immigrants "had not become sufficiently noticeable to be recognized as a danger or an evil." *Id.* He claimed that immigrants congregated in ethnic enclaves which allowed "alien elements [to] control the election of their Congressman even if they do not vote." *Id.*

Vaile's proposal did not succeed, but it set the stage for another debate when representatives from Great Plains and southern states with declining populations twice introduced legislation to remove aliens from the apportionment base. Eagles, *supra*, at 70–71, 77–78.

In 1928, Rep. Homer Hoch of Kansas proposed a constitutional amendment to exclude aliens from Congressional apportionment. He argued that counting aliens meant that states like his lost representation to immigrant-heavy New York. *Id.* at 70. Rep. Fiorello LaGuardia of New York responded that Hoch's proposal was contrary to the American idea of representation: "This is a representative

government, and the very purpose of making an apportionment according to population was to have everyone represented in the Federal Congress." 70 Cong. Rec. 699 (1928).

LaGuardia explained that non-citizens were equally affected by laws passed by Congress, paid taxes, and had been drafted during the First World War. *Id.* at 703. Echoing concerns in 1866 that apportioning on a basis other than population was open to manipulation, LaGuardia warned it was dangerous to allow politicians to decide who was worthy of representation:

> [T]he exclusion of aliens is only the first step in getting away from a popular and constitutional government of free men . . . . Perhaps this is only the entering wedge—first to exclude aliens from the count. And then the next step will be to exclude those who do not own property; and then the next step will be to exclude all those who do not own real property, until the government will be controlled entirely by a small privileged class, as it was in England at the time of the American Revolution.

Id. at 704. Other representatives protested that Hoch's amendment would amount to "taxation without representation." *Id.* at 705.

In 1929, the Senate, likewise, debated a proposed amendment to apportionment legislation offered by Sen. Fredric Sackett of Kentucky that would exclude aliens from the apportionment base.

Sackett argued that "[t]he question of citizenship was not pertinent at th[e] time [of the Founding], but to-day it is doubly pertinent" because of the wave of immigration from southern and eastern Europe in recent decades. 71 Cong. Rec. 1907 (1929). Expressing doubts about the loyalty of immigrants, his amendment would "reserve the American Government for those who have faith in the Nation." *Id.*

Sen. Carraway of Arkansas said it was "unthinkable" that aliens could not serve in Congress but yet could vote indirectly for those offices because of apportionment. *Id.* at 1967. Sen. Capper of Kansas "pointed out that the aliens in five northeastern states would have strength in the electoral college equal to his entire state." Eagles, *supra*, at 77. In a preview of contemporary politics, Sen. James Heflin of Alabama claimed that most immigrants were in the country illegally and called them "crooks, criminals, kidnappers, bandits, terrorists, racketeers, and 'refuse of foreign countries.'" *Id.*

Sackett's proposal was rejected. Much of the counterargument rested on taxation without representation. Sen. Sam Bratton of New Mexico, when pressed by proponents of the change to explain why non-citizens should be included in apportionment, responded:

> [The Constitution was based] upon the theory that aliens were subject to taxation in this country and consequently were entitled to

> representation as a corresponding right accompanying that obligation. A foreigner has always been subject to taxation . . . . [H]e must pay every ordinary species of property tax the same as a citizen of this country. *I dare say that it was felt by the framers of the fourteenth amendment that, although a foreigner could not vote . . . so long as he was compelled to pay tribute to the Government through taxation, he was entitled to be represented.*

71 Cong. Rec. 1912 (1929) (emphasis added). Sen. David Walsh of Massachusetts worried that, if the amendment succeeded, efforts might be made to bar other groups, such as citizens who did not exercise their right to vote. Eagles, *supra*, at 77–78.[3]

Repeatedly throughout our history, Congress reaffirmed that apportionment based on total population is essential to representative democracy. Relying on these debates, one court found that it is "generally accepted that [to exclude aliens from the apportionment base] would require a constitutional amendment." *Fed'n for Am. Immigration Reform* v. *Klutznick*, 486 F. Supp. 564, 576–77 (D.D.C. 1980).

---

[3] The provision requiring allocation according to equal numbers of inhabitants would remain a part of federal apportionment acts until 1929, when it was removed as part of a compromise to allow gerrymandering. *See Wood* v. *Brom*, 287 U.S. 1, 7–8 (1932). *Wesberry* v. *Sanders*, *supra*, restored the total population requirement as constitutionally mandated.

C. Congress Required Total Population-Based Apportionment in Acts Regulating Territories and the Admission of New States

The wide practice of population-based apportionment—and the general rejection of voter-based apportionment—also is reflected in the way Congress governed territories and admitted new states.

In 1787, the last Congress under the Articles of Confederation passed the Northwest Ordinance governing territories west of the Ohio River acquired under the Treaty of Paris. McKay, *supra*, at 21. The Ordinance provided for apportionment of a territorial assembly based on the number of "free male inhabitants." Northwest Ordinance of 1787, *in The Northwest Ordinance 1787: A Bicentennial Handbook* 31–77 (Robert M. Taylor, Jr. ed., 1987). The same apportionment formula was followed by Congress in the organic acts for Kentucky (1790), the Mississippi Territory (1798), Indiana (1800), Michigan (1805), and Illinois (1809).[4] The territorial legislatures for Missouri (1812) and Arkansas (1819) similarly apportioned not on the basis of voters, but all "free white male inhabitants" regardless of age, citizenship, or eligibility to vote. 4 Thorpe, *supra*, at 2140; 1 Thorpe, *supra*, at 262.

---

[4] 1-7 Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the State, Territories, and Colonies Now Or Heretofore Forming the United States of America* (1909); McKay, *supra*, at 275–458.

Then, beginning with the Wisconsin Organic Act in 1836, Congress broadened the apportionment formula to include all inhabitants. 7 Thorpe, *supra*, at 4067. Congress used total population to apportion territorial legislatures, with minor differences in the treatment of Indians, in 12 of the 16 organic acts passed from 1838 onward.[5]

Most state constitutional conventions Congress created also used total population. Of the 19 constitutional conventions between 1802 and 1910, 16 apportioned representation on the basis of population.[6]

---

[5] The organic acts for territories of Iowa (1838), Oregon (1848), Minnesota (1849), New Mexico (1850), Utah (1850), Colorado (1861), Nevada (1861), the Dakotas (1861), Arizona (1863), Wyoming (1868), the District of Columbia (1871), and Oklahoma (1890) all apportioned territorial legislatures based on total population. *Id.* The four exceptions were the organic acts for Washington (1853), Kansas-Nebraska (1854), Idaho (1863), and Montana (1864), which used "qualified voters" for apportionment. *Id.* Records from the Committee on Territories for this period are incomplete, leaving the reasons for variances uncertain. *See The American Territorial System* 95 (John Porter Bloom ed., 1969). However, anti-Mormon bias may have been a factor in the Western territories. *See supra*, II.A.

[6] Constitutional conventions for Ohio (1802), Nevada (1864), Nebraska (1864), North Dakota (1889), South Dakota (1889), Montana (1889), Washington (1889), and Oklahoma (1906) were apportioned explicitly on a total population basis. McKay, *supra*, at 275–458. Conventions for Louisiana (1811), Indiana (1816), Mississippi (1817), Illinois (1818), Alabama (1819), Missouri (1820), Minnesota (1857), and Utah (1894) either relied on apportionment of territorial legislatures or specified representation for each county. *Id.* Only constitutional conventions for Colorado (1875) and Arizona/New Mexico (1910) were based on votes cast in the last election. *Id.*

D. Most State Constitutions Required Apportionment on the Basis of Total Population Prior to the 1960s Reapportionment Cases, and Nearly All States Have Adopted Some Form of Total Population Apportionment Since

At the state level, population-based apportionment also has been favored, and voter-based apportionment disfavored.

At the time of independence, apportionment was generally based on counties or towns (following the English model), but, even in those states, apportionment often loosely correlated with population because of provisions giving greater representation to larger towns. McKay, *supra*, 16–17. After the Revolution, many new state constitutions embraced some form of population-based apportionment more directly, starting with the Pennsylvania constitution of 1776, which explicitly adopted total population. *Id.*

As new states joined the Union, the overwhelming number apportioned based on population, at least in one house. One scholar calculates that in original constitutions, "32 upper houses and 26 lower houses were apportioned essentially on the basis of population," even after application of provisions such as those guaranteeing minimum representations to counties. Robert G.

In the case of Arizona/New Mexico, poor census data appears to have been behind the use of votes rather than persons. H.R. Rep. No. 2079, at 5 (1909).

Dixon, *Democratic Representation: Reapportionment in Law and Politics* 76 (1968). In the original constitutions of 21 states, both houses were apportioned effectively according to population. *Id.*

What is clear is the near complete rejection of voter-based apportionment. Of the 123 state constitutions adopted between 1776 and 1920 (excepting Confederate state constitutions), only 15 used qualified electors, and only two used votes cast, for apportionment.[7] Four other states at various points excluded aliens from their apportionment bases.[8] Even these states, however, counted citizen children and other nonvoters such as women. *Id.* By contrast, 185 chambers under 92 constitutions during this period were apportioned on some form of population.[9] *Id.*; *see* Appendix, *infra*.

---

[7] Florida (1868-85), Kentucky (1799-1890), Louisiana (1812-52, 1864-68), Massachusetts (1857-1967), Mississippi (1869-90), New York (1777-1821), Tennessee (1834-1966), and Texas (1845-1965). Douglas Keith and Eric Petry, *Apportionment of State Legislatures, 1776-1920*, available at http://www.brennancenter.org/analysis/apportionment-state-legislatures-1776-1920. Idaho apportioned its first legislature in 1889 on the basis of votes cast in the last delegate election, and from 1918-1966, Arizona used votes cast in the last gubernatorial election before the provision was found to be unconstitutionally discriminatory. *Id.*; *see also Klahr* v. *Goddard*, 250 F. Supp. 537, 541–42 (D. Ariz. 1966).

[8] New York from 1821-1969 and North Carolina from 1868-1968 both excluded aliens. Maine (1820) and Nebraska (1920), in theory, still do but, in practice, no longer do. Keith and Petry, *supra*; McKay, *supra*, at 336, 366, 381, 391.

[9] A handful of other states during this period apportioned legislative chambers based on taxes paid or fixed geographic units. Keith and Petry.

To be sure, even where states adopted population for apportionment, they often did so imperfectly because of efforts to shoehorn representation of people into the framework of counties and territorial units. This would play a key role in the malapportionment crisis of the twentieth century. Early on, populations were often fairly evenly distributed across each state, and there was little hesitation about expanding the size of legislatures as population grew, meaning that population variances were relatively minimal. McKay, *supra*, at 25–26. But as Americans increasingly moved to cities and towns, and rural counties depopulated, disparities became wider. *Id.* at 26. By the 1960s, this, combined with the refusal of many legislatures to redistrict at all, meant that apportionment in most states bore little relation to actual population. *Id.* at 28.

Since *Reynolds*, however, all states use total population for apportionment, with narrow adjustments in only eight states for various non-residents.[10] None apportion on the basis of voters or citizens. *Id.*

---

[10] California, Delaware, Maryland, and New York exclude from apportionment prisoners whose domicile before incarceration was outside the state. *See* App. To Appellee's Brief. These exclusions make total-population counts more accurate—the states count incarcerated persons where they resided before incarceration, rather than where prisons are located. Counting them in prison districts would artificially inflate the population and representation of the prison districts, where the incarcerated persons share no community of interest. *See, e.g.*, *Fletcher* v. *Lamone*, 831 F. Supp. 2d 887, 895–97 (D. Md. 2011), *aff'd* 133 S. Ct. 29 (2012). Washington excludes non-

II. APPORTIONMENT BASES OTHER THAN TOTAL POPULATION HAVE BEEN WIDELY MANIPULATED FOR DISCRIMINATORY PURPOSES

In the infrequent instances in which Congress or states deviated from apportionment based on total population, history shows that politics of exclusion or outright discrimination was at work.

A. Idaho

In the Mountain West, rampant anti-Mormon sentiment in the nineteenth century fueled passage of laws designed to weaken the political power of a fast-growing community that many saw as anti-American. In the 1880s, Congress and Idaho's territorial legislature passed laws disenfranchising Mormons. Joseph H. Groberg, *The Mormon Disfranchisements of 1882 to 1892*, 16 BYU Stud. 399, 400–01 (1976).

Efforts to limit the power of Mormons in Idaho dominated debates in 1889 over the form of the proposed state constitution. The constitutional convention prohibited Mormons from voting and denied representation to heavily Mormon southern Idaho by apportioning the new state's legislature according to the "number of votes cast" rather than total population. When asked why the number of

---

resident military personnel, and Kansas and Hawaii exclude non-resident military personnel and out-of-state students. *See* App. To Appellee's Brief. The constitutions of Maine and Nebraska, in theory, exclude aliens and New Hampshire's constitution allows the legislature to exclude non-residents, but the practice in all three is to count everyone. Keith and Petry.

votes rather than population was being used, the chairman of the drafting committee explained that non-voting Mormons should not be allowed a "large" amount of representation:

> Because it was thought it would not be proper to give the Mormon counties which cannot vote so large an amount of representation as it would give them if the representation was given in accordance with population.

1 *Proceedings and Debates of the Constitutional Convention of Idaho, 1889* 487 (I.W. Hard ed., 1912).

B. New York

In New York, hostility toward immigrants drove the decision in 1821 to exclude aliens, along with "paupers and persons of colour [*sic*] not taxed" from the state's apportionment base. The champions of the change argued that immigrants (largely in New York City) were "unsound" and that counting them would be "injurious if not dangerous to the independence of the country." *Reports of the Proceedings and Debates of the Convention of 1821, Assembled for the Purpose of Amending the Constitution of the State of New York* 410 (Nathaniel H. Carter et al. eds., 1821).

In opposition, Delegate Abraham Van Vechten argued that the proposed rule improperly equated representation with voting:

> [T]he idea appears to have been entertained by some gentlemen present,

> that none are represented in our legislature, but those who have a right to a voice in the election of its members. This is a mistake—all classes are represented. There may be a vast amount of property owned by persons not possessing the right of suffrage; and is this to have no weight, or receive no consideration? All classes of the community have a right to representation—and having proceeded thus far in admitting a large portion of voters in the country, we are bound in duty to render an equivalent to the inhabitants of the city of New-York.

Id. at 409.

The proposed apportionment rule passed, and New York excluded aliens until the 1960s. The underrepresentation of New York City in the legislature had precisely the disparate impact the Framers feared: while nearly half the population of New York lived in New York City in 1961-62, only 38 percent of state funds distributed to local governments went to New York City. McKay, *supra*, at 56.

C. Massachusetts

The wave of Irish Catholic immigration to Massachusetts led to efforts to underrepresent immigrant-heavy areas.

An effort to adopt a "legal voters" apportionment base in 1853 failed, largely based on

the force of arguments rooted in the principles of the Framers. One opponent had vocally declared that the very purpose of the American Revolution was to make sure that representation and taxation "go together":

> By adopting such a basis as this, we shall violate what I have supposed has always been considered as the leading principle at the very foundation of our government, that representation and taxation should go together. What do [the] gentlemen propose? That none but legal voters shall be reckoned as the basis of representation? Will they say that the remainder of the population shall be omitted in making up the taxes? It strikes me, that this would be a violation of the very principle which laid at the foundation of our Revolution.

Official Report of the Debates and Proceedings in the State Convention: assembled May 4, 1853, to revise and amend the constitution of the commonwealth of Massachusetts 194 (Harvey Fowler ed., 1853). Another argued that populated areas needed representation even if many of the inhabitants were immigrants:

> The very reason why so large a number of inhabitants concentrate in these large cities is because the great interests of business are concentrated there, and those interests require

> legislation in proportion to their novelty, magnitude, and importance.

Robert Luce, *Legislative Principles: The History and Theory of Lawmaking by Representative Government*, 366 (1930).

But after the Know-Nothings captured the governor's office and legislature in 1854, they "proposed and passed legislation aimed at restricting the strength of the growing Irish community in Boston . . . [including] a legislative redistricting that would reduce the number of seats in predominantly immigrant Boston." Steven Taylor, *Progressive Nativism: The Know-Nothing Party in Massachusetts*, 28 Hist. J. Mass. 167, 167–68 (2000). In 1857, the Know-Nothings succeeded in amending the state constitution to switch the apportionment base from "inhabitants" to "legal voters." 3 *Debates in the Massachusetts Constitutional Convention, 1917-1918* 161 (1920). As with New York, this new apportionment formula would last until the 1960s. *Supra* at 23, n.7.

D. The Southern States

Five of the eight states that at one point apportioned using voters were in the South.[11] These were often instances designed to disempower and deny representation to African Americans and other minorities.

Kentucky's first constitution (1792) made no distinction between whites and free blacks. By the

---

[11] *See* footnote 7.

end of the decade, however, whites increasingly found the presence of a large number of free blacks in the state "at best unsettling and at worst dangerous." John V. H. Dippel, *Race to the Frontier: "White Flight" and Westward Expansion* 144 (2005). When the Kentucky General Assembly adopted a new constitution in 1799, it limited the franchise to white males and apportioned the state legislature on the basis of "qualified voters." *Id.* The changes had their desired effect: large numbers of free blacks left Kentucky for the Ohio Territory. *Id.*

In Texas, likewise, jockeying over political power at the time of statehood between the slave-heavy east and the western frontier (which had higher numbers of voters) led to a compromise that apportioned seats in the state house on the basis of population and seats in the senate on the basis of "qualified electors." John Cornyn, *The Roots of the Texas Constitution: Settlement to Statehood*, 26 Tex. Tech. L. Rev. 1089, 1148–50 (1995). Supporters of "qualified electors" gained traction, in part, when they framed their arguments in terms of a "racist appeal" about "the effects of emigration of Mexicans, Indians, and others" to certain parts of the state. *Id.* at 1148. The Texas senate would continue to be apportioned on the basis of qualified electors until 1965 when courts struck down elector based apportionment as unconstitutional and a violation of the Voting Rights Act. *See Kilgarlin* v. *Martin*, 252 F. Supp. 404, 411 (S.D. Tex. 1966); *Terrazas* v. *Clements*, 581 F. Supp. 1319, 1328 (N.D. Tex. 1983) (finding in court-approved settlement that apportionment under the Texas Constitution based

on "qualified electors rather than population dilutes the voting strength of racial and ethnic minorities").

E. California

In California, animus toward the Chinese drove the state to enact measures to exclude the Chinese from apportionment.

The state's initial constitution in 1850 had counted only white inhabitants in apportionment. Cal. Const. of 1850, art. IV, § 29. When the state adopted a new constitution in 1879, it followed the lead of the federal constitution in embracing apportionment by population, but with a key proviso: "no persons who are not eligible to become citizens of the United States, under the naturalization laws, shall be counted as forming a part of the population of any district." Cal. Const. of 1879, art. IV, § 6 (repealed 1980). The proviso was aimed at the Chinese, who, under then current naturalization laws, could not become naturalized citizens. Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History* 312 (1997).

This came at a time of rising anti-Chinese sentiment that culminated three years later when Congress passed the Chinese Exclusion Act of 1882. Chinese Exclusion Act, Pub. L. No. 47-71, 22 Stat. 58 (1882) (repealed 1943); *see also* Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 Cal. L. Rev. 61, 61–63 (1947). It granted the legislature the authority to enact "all necessary regulations for the protection of the State . . . from the burdens and evils arising from the

presence of aliens." Cal. Const. of 1879, art. XIX, §§ 1–4 (repealed 1952).

F. Hawaii

In Hawaii, the decision by Congress to use citizens for apportionment of the territorial legislature took place in a period of active fear about the potential political power of Asian immigrant communities. *See* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 585 n.199 (1996).

The Hawaii Organic Act provided an initial apportionment for the territory's legislature, but required that all future reapportionment be based on the number of citizens, rather than total population. *An Act to provide a government for the Territory of Hawaii*, ch. 339, § 55, 31 Stat. 141 (1900).

At the same time, the Organic Act restricted access to citizenship for the Asian populations. While the House Committee on Territories described Portuguese and Native Hawaiian residents who would have access to citizenship as "peaceable" and "industrious," the Organic Act denied citizenship to almost all of the territory's Chinese and Japanese residents by limiting citizenship to those born or naturalized as citizens under the Republic of Hawaii. The Republic had not naturalized any foreigners since before the most recent wave of immigration. H.R. Rep. No. 56-305, at 7–9 (1900).

III. TOTAL POPULATION SHOULD BE THE PRESUMPTIVE APPORTIONMENT BASE

History teaches that total population is not only a permissible constitutional value but one that should be preferred over apportionment bases like voters or citizens, and any variation from total population should be prohibited except in rare and extraordinary circumstances.

As Congress and the states have recognized in the years since 1868, total population best fulfills the Fourteenth Amendment's promise that all "persons," not just citizens or voters, are guaranteed the equal protection of the laws. It assures that legislative officials are familiar with and can represent the interests of all inhabitants of their districts and that our governments are, in fact, of the people, by the people, and *for the people*.

The Framers chose a form of total population to apportion Congress because they maintained that representation for all the people was the only way to fulfill the Constitution's mandate that the "House of Representatives shall be composed of Members chosen . . by the People . . . ." *Wesberry*, 376 U.S. at 13. For them, it was synonymous with the principle of "equal representation for equal numbers of people" that they considered the fundamental principle for apportioning House members among states. *Wesberry* found that the Framers would have intended that same standard for apportioning congressional districts *within* states. *Id.* at 8–9, 13–

14. In *Reynolds*, the Court extended those principles to state legislatures. *Reynolds*, *supra*.

Voter-population apportionment, by excluding children and other nonvoters, ironically would recreate the very situation this Court's reapportionment jurisprudence of the 1960s was intended to remedy: less populous areas would have greater representation than more populous areas, thereby giving voters in more populous areas less political representation, and less access to state and local resources, than voters in less populous areas. This would hurt all people, voters and nonvoters alike, living in those more populous areas. Voters and nonvoters need schools for their children, police and fire protection for their neighborhoods, and the transportation, health and other services provided by state and local governments. The need for these services is proportional to population, and history shows that populous but underrepresented areas were often underserved and underfunded.[12] This was precisely the situation that *Reynolds* held violated the Equal Protection Clause. 377 U.S. at 533. Voter-based apportionment also would reopen the door to the manipulation that the Court in *Burns* v. *Richardson*, 384 U.S. 73 (1966) cautioned against.

---

[12] *See generally* Stephen Ansolabehere, et al., *The End of Inequality: One Person, One Vote and the Reshaping of American Politics* (2008) (finding that transfers of public funds to a district increase proportionally with the district's representation, and that malapportionment leads to underfunding of more populous districts); *see also* Stephen Ansolabehere, et al., *Equal Votes, Equal Money: Court Ordered Redistricting and Public Expenditures*, 96 Am. Pol. Sci. Rev. 767, 767 (2002) (same).

A. Apportionment Based on Total Population Fully Satisfies Equal Protection

Appellants invoke the principle of "one person, one vote" to claim that reapportionment on the basis of total population violates the Equal Protection Clause where it results in differences in voter populations among districts. This reflects a misunderstanding of both the "one person, one vote" case law and this Court's separate reapportionment jurisprudence.

"One person, one vote" originated in *Gray* v. *Sanders*, 372 U.S. 368 (1963), a case in which voters in statewide elections, choosing among the same candidates for statewide office, were assigned differently weighted votes (because winning required carrying the majority of counties, not the majority of votes). The Court held that the Equal Protection Clause required that each voter in such statewide elections was entitled to a vote equal to the vote of every other voter in the same election. *Id.* at 380–81. In other words, within a given electoral unit—be it a state as a whole in a statewide contest or a legislative district in a race for legislator—no voter's vote can count more than another's.

This Court stressed, however, that it neither addressed nor decided the very different question of legislative apportionment first posed by *Baker* v. *Carr*, 369 U.S. 186 (1962)—*i.e.*, "the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State Legislature in designing the geographical districts

from which representatives are chosen either for the State Legislature or for the Federal House of Representatives." *Gray*, 372 U.S. at 376; *see also id.* at 381–82 (Stewart, J. concurring). The Court would not address reapportionment of representation within state legislatures until *Reynolds* v. *Sims*, *supra*, when it relied not on *Gray*, but on the Constitution's apportionment principles for congressional representation laid out in *Wesberry* v. *Sanders*, *supra*.

Decided a year after *Gray*, *Wesberry* required apportionment of congressional districts within states on the same basis as Article I, Section 2, as amended by the Fourteenth Amendment, requires for apportionment of House members among the states—on a total-population basis to reflect the Framers' principle of "equal representation for equal numbers of people." 376 U.S. at 18.

Relying on *Wesberry*, *Reynolds* held that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people." 377 U.S. at 560–61. While *Reynolds* described *Gray* as establishing the principle of voter equality, it explained that *Gray* was not determinative. *Id.* Instead, *Reynolds* established that, for reapportionment, "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568. *Reynolds* emphasized: "[W]e mean that the Equal Protection Clause requires that States make an honest and good faith effort to construct districts, in both houses of its

legislature, as nearly of equal population as is practicable." *Id.* at 577.[13] In this context, Equal Protection is satisfied for voters because every voter can vote for a representative representing an equal number of people. *Id.* at 575–77. Nonvoters and voters are protected by enjoying equal representation.

There is no question that *Reynolds* understood that apportionment based on total population fully satisfies and ensures Equal Protection. Its holding that Alabama's redistricting plan violated the Equal Protection Clause was based solely on disparities in total population, and the Court repeatedly referred to "population" as the basis for reapportionment. *Id.* at 568–69, 576, 583. That principle has been accepted in this Court's subsequent reapportionment decisions. *See, e.g.*, *Kirkpatrick* v. *Preisler*, 394 U.S. 526, 530–31 (1969).

B. *Burns* v. *Richardson* Does Not Support Voter-Based Apportionment

Burns v. *Richardson*, *supra*, does not change the constitutional status given to population as the basis for apportionment. If anything *Burns*' awareness of the history of manipulation with voter-

---

[13] *Reynolds* goes on to say: "We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." The decision in *Reynolds*, however, was based entirely on disparities in Alabama's districts using total population. The reference to "citizens or voters" is dicta that was not based on any consideration of the problems that use of such population bases would entail and how they might conflict with the constitutional principles discussed above.

based apportionment argues for high caution whenever such systems are used.

In *Burns*, this Court acknowledged that the holding in *Reynolds* was based on total population. 384 U.S. at 91. Nevertheless, relying on dicta, *Burns* maintained that *Reynolds* left open the question of whether other population bases might suffice. *Id.* at 91 & n.20. On the facts before it, the *Burns* Court upheld Hawaii's interim use of a voter registration base for the soon impending 1966 election. *Id.* at 91–92. *Burns* is not, however, an uncategorical endorsement for voter registration or any other form of voter-based apportionment.

In allowing the Hawaii voter-registration base, *Burns* criticized such voter bases as problematic, recognizing, as the history above shows, that such alternative apportionment bases can be used as a means of manipulation or for political advantage:

> Use of a registered voter or actual voter basis presents an additional problem. Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a "ghost of prior malapportionment."

Id. at 92–93 (quoting *Buckley* v. *Hoff*, 243 F. Supp. 873, 876 (D. Vt. 1965)).

The Hawaii legislature defended its decision to use registered voters based on the unique geographic distribution of districts among Hawaii's islands, and the unusual concentration of military personnel and tourists that would exaggerate the population of the island of Oahu for apportionment purposes. After taking these "special population circumstances" into account—and finding that the difference between registered voters and total population was due largely to the military personnel—the Court found that apportionment on the basis of registered voters was permissible, *but only* because it produced results that were substantially the same as those of both a total population and a citizen base. *Id.* at 93–94. The Court was explicit about the limited reach of its decision, and cautioned against taking it out of its unique context:

> We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere. . . . We hold that, with a view to its interim use, Hawaii's registered voter basis does not on this record fall short of constitutional standards.

Id. at 96–97.

Burns should not be construed as license for wholesale departures from the constitutional principles of total population, particularly in light of

its well-founded concerns about manipulation.[14] To be sure, *Burns* suggested that the exclusion of non-citizens and disenfranchised persons convicted of a crime might be constitutional. *Id.* at 91–92. Unlike the exclusion of military transients or persons who are in fact domiciliaries of other jurisdictions, however, excluding children, non-citizens, and disenfranchised persons, or other residents is contrary to our founding principles, such as "no taxation without representation," and their corollary that those subject to the burdens and benefits of the laws are entitled to equal and effective representation. It also is contrary to our Nation's history and practice as detailed above. In many states, the apportionment impact would be dramatic, leading to underrepresentation of more populous districts and misallocation of resources from those districts to less populous districts.

The Framers, the drafters of the Fourteenth Amendment, and Congress and virtually all state legislatures for more than 200 years selected population as the appropriate apportionment base. Based on that history, and on this Court's reapportionment jurisprudence, it is clear that total population ensures the equality of representation essential to the democratic structure of our national and state governments and should be the presumptive apportionment base.

---

[14] *See supra*, II for examples.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to affirm the District Court's judgment dismissing Appellants' claims and require use of total population as the presumptive apportionment base.

Respectfully submitted,

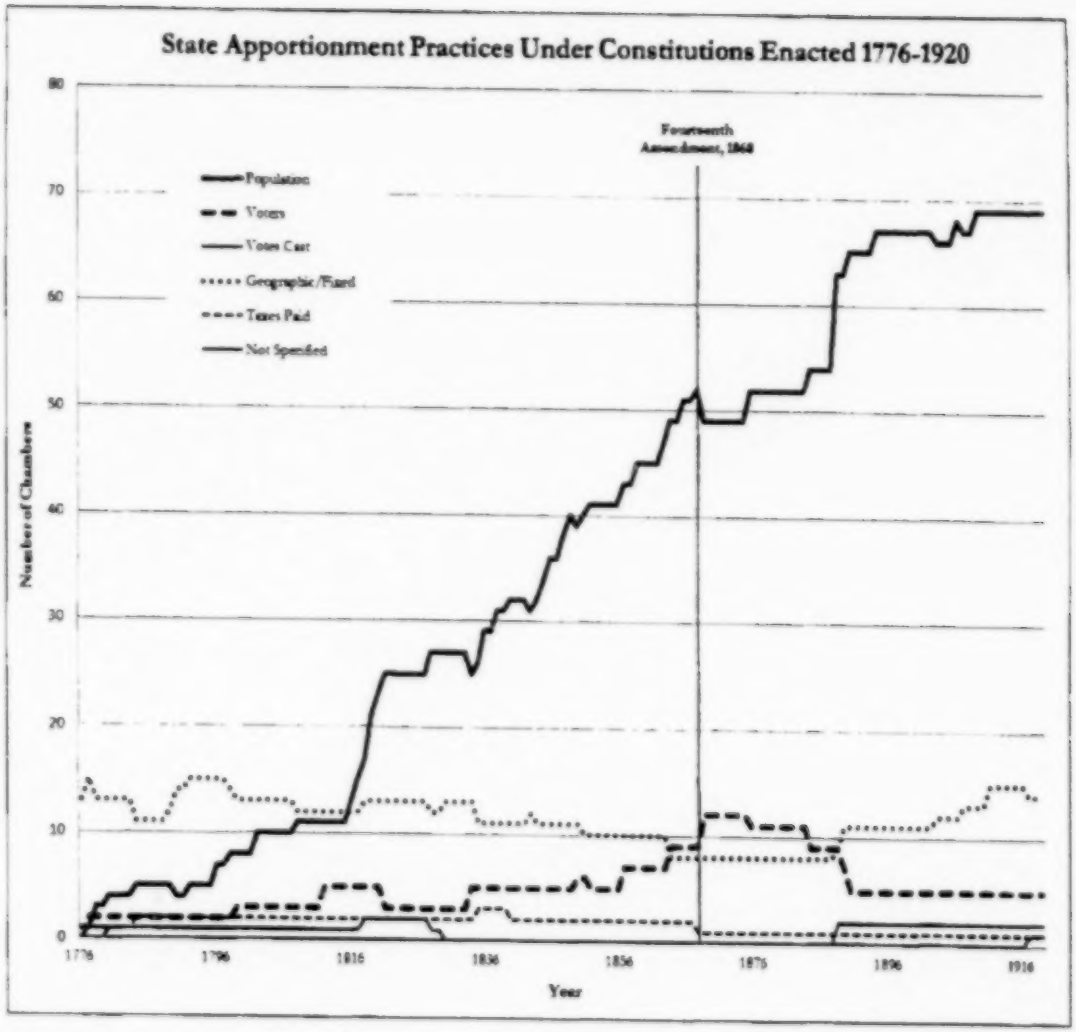
SIDNEY S. ROSDEITCHER
Counsel of Record
ROBERT A. ATKINS
PIETRO SIGNORACCI
ELIZABETH M. GARY
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000
srosdeitcher@paulweiss.com

WENDY R. WEISER
MICHAEL C. LI
THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
(646) 292-8310
wendy.weiser@nyu.edu

Attorneys for *Amicus Curiae*
The Brennan Center for Justice

September 25, 2015

APPENDIX



*Note: This chart reflects state constitutions enacted between 1776 and 1920. Population includes all instances where the apportionment base is broader than eligible voters of the time. *See* Keith and Petry, *supra* note 7, at 22.

Supreme Court, U.S.
FILED
AUG - 7 2015
OFFICE OF THE CLERK

No. 14-940

In the Supreme Court of the United States

Sue Evenwel, et al.,

Appellants,

v.

Greg Abbott,
in his official capacity as Governor of Texas, et al.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF THE CATO INSTITUTE AND REASON FOUNDATION AS *AMICI CURIAE* SUPPORTING APPELLANTS

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
One Bunker Hill Building
601 W. Fifth St., Ste. 800
Los Angeles, CA 90071
(213) 617-0414
mklausner@mac.com

Ilya Shapiro
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

August 7, 2015

QUESTIONS PRESENTED

1. When equalizing populations across electoral districts as required by the Fourteenth Amendment's Equal Protection Clause—the "one person, one vote" standard—is the relevant population to be equalized the number of people or the number of eligible voters?

2. Does the "federal analogy" to the U.S. House of Representatives, in which states are awarded representation based on total population, provide apposite guidance in answering Question 1?

3. Even if the "federal analogy" provides no support for a state unequally weighing voter strength, can this voter inequality be justified as a permissible side-effect of the racial gerrymandering which Section 2 of the Voting Rights Act has been interpreted to require?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE "FEDERAL ANALOGY" TO THE U.S. HOUSE IS INAPPOSITE 4

A. Courts Have Simplistically Relied on the Federal Analogy to Uphold Voter Inequalities 4

1. There is no disputing that the U.S. House allocates representatives by total population 4
2. Courts have not thoroughly examined the history or purpose of the federal rule ... 5

B. The Federal Rule Was Created to Protect Federalism, Not Voter Equality 7

1. Allocating House members by eligible voters would present states with a perverse incentive 7
2. The Framers were correct to choose a federalist system of voter qualification over voter equality 9
3. No similar federalist concerns exist at the intra-state level 10

C. The Federal Rule Was Intimately Tied to State Taxation 11

1. Apportionment by population checked the incentive to underreport population for tax purposes 11
2. Linking representation and taxation increased support for the Three-Fifths Compromise 13
3. No such concerns are operative today at the state level 13

D. The Federal Rule Was Preserved in 1866 to Ensure Virtual Representation for Women, not Aliens 14

1. The Fourteenth Amendment rejected a theory of virtual representation for nonvoting blacks 14
2. The Fourteenth Amendment retained the population rule to ensure women would be represented 19
3. Aliens were retained in apportionment for several reasons unrelated to virtual representation 21
4. Aliens are not "virtually represented" by voters who happen to live near them ... 25
5. Concerns for representing nonvoting women are no longer relevant at the state or federal level 27

E. The Federal Rule Does Not Result in Voting Strength Disparities of the Same Scale as the Texas Plan 28

1. The larger size of states naturally inclines them toward heterogeneity 28
2. One fifth of the Texas districts are more malapportioned than the most malapportioned state 30

3. State boundaries cannot be gerrymandered to create "grossly absurd and disastrous results" 32

II. "ENFORCING" THE VRA DOES NOT JUSTIFY ABRIDGING ONE PERSON, ONE VOTE 33

CONCLUSION 36

TABLE OF AUTHORITIES

Page(s)

Cases

Alabama Legislative Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) 34

Burns v. Richardson,
384 U.S. 73 (1966) 32

Brown v. Thomson,
462 U.S. 835 (1983) 29

Calderon v. City of Los Angeles,
481 P.2d 489 (Cal. 1971) 6, 18

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2000) 6, 34, 35

Chen v. City of Houston,
532 U.S. 1046 (2001) 35

Daly v. Hunt,
93 F.3d 1212 (4th Cir. 1996) 18, 35

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1990) 6, 35

Gray v. Sanders,
372 U.S. 368 (1963) 3, 10

Lepak v. City of Irving,
453 Fed. Appx. 522 (5th Cir. 2011) 35

Mahan v. Howell,
410 U.S. 315 (1973) 30

Pollock v. Farmer's Loan & Trust Co.,
157 U.S. 429 (1895) 11–12

Reynolds v. Sims,
377 U.S. 533 (1964) 2, 5

Thornburg v. Gingles,
478 U.S. 30 (1986) 26

United Jewish Organizations v. Carey,
430 U.S. 144 (1977) 25–26

Wesberry v. Sanders,
376 U.S. 1 (1964) 4, 15

Statutes and Constitutional Provisions

Tex. El. Code Ann. § 11.002 10

U.S. Const. art. I, § 2, cl. 1. 10

U.S. Const. art. 1, § 2, cl. 3 ..... *passim*

U.S. Const. amend. XIV, § 2 ..... *passim*

U.S. Const. Amend. XVI 12

Other Authorities

Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*,
55 U. Chi. L. Rev. 1043 (1988) 14

Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (2000) 10, 14–15

American Community Survey Special Tabulation Using Census and American Community Survey Data 2009-2013, Texas Plan S172, ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED116_ACS_Special_Tabulation_2009-2013.pdf..... 30

Cong. Globe, 39th Cong., 1st Sess. (1866) .....*passim*

Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 Ariz. St. L.J. 1237 (2012) 5, 7, 8, 9, 15

Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clause)*, 21 Const. Comment. 355 (2004)..... 12, 13

2 Farrand's Records: The Records of the Federal Convention of 1887 (Max Farrand ed.) (1911)..... 8, 9, 10, 13

The Federalist (Clinton Rossiter ed., 1961).....*passim*

G. Alan Tarr, *Explaining Sub-National Constitutional Space*, 115 Penn St. L. Rev. 1133 (2011) . 10

George P. Smith, *Republican Reconstruction and Section Two of the Fourteenth Amendment*, 23 Western Pol. Q. 829 (1970) 21

I J. Story, Commentaries on the Constitution (5th ed. 1891)..... 12

Mark R. Killenbeck & Steve Sheppard, *Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and the Right to Representation*, 45 Hastings L.J. 1121 (1994) 22–23

Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia: Constitutionality of the D.C. Voting Rights Bill in Light of Section Two of the Fourteenth Amendment and the History of the Creation of the District*, 60 Ala. L. Rev. 783 (2009) 16–17

Peter Odegard, The American Republic (1964) 23

Pew Hispanic, *Mapping the Latino Electorate by State*,http://www.pewhispanic.org/interactives/mapping-the-latino-electorate-by-state/ 28

Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Their Children?: Toward a Conversational Understanding of American Democracy*, 94 Nw. U. L. Rev. 503 (2000) 32–33

Sanford Levinson, *One Person, One Vote: A Mantra in Need of a Meaning*, 80 N.C. L. Rev. 1269..... 6

Scot A. Reader, *One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts*, 17 Harv. J.L. & Pub. Pol'y 521 (1994) 15

Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 Nw. U. L. Rev. 1229 (2000) 9, 10

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutional government that are the foundation of liberty. To those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Reason Foundation is a nonpartisan public policy think tank founded in 1978. Its mission is to advance a free society by developing and promoting libertarian principles and policies. Reason supports market-based solutions that encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, online commentary, and policy research reports. To further its commitment to "Free Minds and Free Markets," Reason files briefs on significant constitutional issues.

Amici's main concern here is that the crucial right to an equally weighted vote protected by the Equal Protection Clause of the Fourteenth Amendment—the "one person, one vote" standard—not be abrogated because of a false analogy to another part of that same amendment or by contorted interpretations of the Voting Rights Act.

---

[1] Rule 37 statement: All parties lodged with the Clerk blanket consents to the filing of *amicus* briefs. Further, no part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

When this Court was asked more than 50 years ago to uphold grossly disproportionate state legislative districts, Alabama argued that states should be allowed to implement a "little federal system" that would be "framed after the Federal System of government—namely one senator in each county of the state." Brief for Appellant Reynolds at 14, 35, *Reynolds v. Sims*, 377 U.S. 533 (1964) (Nos. 23, 27, 41). This Court correctly realized then that "the federal analogy [is] inapposite and irrelevant to state legislative districting schemes." *Reynolds*, 377 U.S. at 573.

After all, the states are "separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government," *id.* at 574, whereas "[p]olitical subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities, [but rather] have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Id.* at 575. Further, since "[t]he system of representation in the two Houses of the Federal Congress . . . [arose] from unique historical circumstances," *id.* at 574, "the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted." *Id.* at 573.

Today, this Court is being presented with a new, 21st-Century version of the federal analogy, this time relating to the other chamber of Congress. Texas and its supporters are arguing that because the Constitu-

tion apportions seats in the House of Representatives by total population rather than voter population, states should be able to do the same for their own legislative districts.

This federal analogy works no better than the last one. Careful study of the history and purpose of both Section 2 of Article I and Section 2 of the Fourteenth Amendment shows that the rule they established is one for dealing with separate states that possess a great deal of legal autonomy—not least in defining for themselves how to select their congressmen (subject to congressional alteration, per Section 4 of Article I). That is not the case with respect to state legislative districts. Despite the Appellees' contentions, states' political subunits are simply not mini-states.

Federal apportionment is thus of no moment to intra-state districting and we are left with the simple principle this Court has consistently upheld, that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

Nonetheless, another argument has been put forward to justify violating this principle—that Section 2 of the Voting Rights Act requires gerrymandering state legislative districts to create majority-minority districts where possible, and that this "compelling interest" justifies the effect of unequal voter strength. This argument fails because even if the VRA does ask states to do such gerrymandering—a question for another time—such legislation cannot trump the Constitution. Where equal protection comes into conflict with the VRA, the latter must yield.

ARGUMENT

I. THE "FEDERAL ANALOGY" TO THE U.S. HOUSE IS INAPPOSITE

A. Courts Have Simplistically Relied on the Federal Analogy to Uphold Voter Inequalities

1. There is no disputing that the U.S. House allocates representatives by total population.

Before showing why the current federal analogy does not work, it is necessary to lay out why it may, at first blush, seem appealing. There is no question that the Constitution has, since its inception, awarded representation in the U.S. House to the states on the basis of total population. U.S. Const. Art. I, § 2, cl. 3. Accordingly, ever since the first census of 1790, there have been disparities in the relative voting power of those voting for House members from state to state. To point out one obvious example, "[s]ince no slave voted, the inclusion of three-fifths of their number in the basis of apportionment gave the favored States representation far in excess of their voting population. If, then, slaves were intended to be without representation, Article I . . . 'weighted' the vote of voters in the slave States." *Wesberry v. Sanders*, 376 U.S. 1, 27 (1964) (Harlan, J., dissenting).

After the abolition of slavery, the infamous "Three-Fifths Compromise" was removed by the Fourteenth Amendment, but using total population rather than voter population remained the primary basis for allocating state representation. "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding In-

dians not taxed." U.S. Const. Amend. XIV, § 2. Since the passage of that amendment, women have been given the vote and we no longer live in an era where "[even] in the most liberal of [states, the right of voting] has always been confined to a small minority of people." Cong. Globe, 39th Cong., 1st Sess. 2962 (1866) [hereinafter Globe] (statement of Sen. Hendricks). Yet aliens, felons, minors, and others ineligible to vote do still reside in every state, and "some states have far more children or noncitizens in their populations, and some have far fewer of them," Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 Ariz. St. L.J. 1237, 1261 (2012), so today the percentage of a state's population who are eligible to vote ranges from 62.6% in California to 78.8% in Vermont. *See* Figure 1, *infra* Part I.E.1.

As a result, real disparities in vote weight for the U.S. House exist from state to state, ranging from one representative for every 451,887 eligible voters in California to one representative for every 568,321 eligible voters in Vermont. *Id.* (Data equalized to eliminate the effects of rounding each state to a whole number of representatives. *See* note 2 *infra*, Part I.E.1.). The question that must be addressed, however, is whether such disparities *between* states mean it is constitutionally permissible to create disparities *within* states.

2. Courts have not thoroughly examined the history or purpose of the federal rule.

Ignoring the admonishments of the *Reynolds* Court, two circuit courts and the California Supreme Court have proffered the federal rule as a compelling indication that state allocation of representatives by

total population, rather than voter population, must be permissible. A state apportionment on the basis of total population has been held to "derive[] from the constitutional requirement that members of the House of Representatives are elected 'by the people' from districts 'founded on the aggregate number of inhabitants of each state,'" *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990) (citing *Federalist* 54 (Madison)), since "[t]he framers were aware that this apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants, convicts, the insane, and, at later times, aliens." *Id.* That the federal rule could have been changed by the Fourteenth Amendment but was kept intact has likewise been put forward as support for allowing a similar system at the state level. "[T]he drafters of the Fourteenth Amendment . . . do appear to have debated this question, and rejected a proposal rooted in . . . the principle of electoral equality." *Chen v. City of Houston*, 206 F.3d 502, 527 (5th Cir. 2000). *See also Calderon v. City of Los Angeles*, 481 P.2d 489, 493 n.6 (Cal. 1971) "([I]t seems clear that total population—not voters—was the apportionment criterion envisioned by the framers of the Constitution.")

Scholars have also noted the superficial appeal of this federal analogy, but have left open the constitutional question of whether this analogy is determinative. *See, e.g.*, Sanford Levinson, *One Person, One Vote: A Mantra in Need of a Meaning*, 80 N.C. L. Rev. 1269, 1283 ("It may be, of course, that Section 2, properly interpreted, places constraints on Congress that the Equal Protection Clause does not place on the states themselves.") Neither courts nor scholars have actually examined the purpose behind the fed-

eral rule as demonstrated by its history, and this examination shows why the federal analogy is inapt.

B. The Federal Rule Was Created to Protect Federalism, Not Voter Equality

1. Allocating House members by eligible voters would present states with a perverse incentive.

The federal rule of apportioning House seats creates a division of power between state governments and the federal government in determining the representation of each state. As James Madison identified in *The Federalist Papers*, "[i]t is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate." *Federalist* 54. Thus, "the Constitutional Convention [reached] a fairly simple assessment of the balance of political power by counting population. . . . But the decision as to who among that population would vote was left to other governing bodies—an element of invisible federalism." Muller, *Invisible Federalism*, 44 Ariz. St. L.J. at 1249 (citations omitted).

Why was it so important to have this dichotomy, a single federal rule (total population) to determine every state's representation, coupled with individual state rules for determining the franchise? Suppose what would have happened if U.S. House seats had instead been allocated on the basis of eligible voters, but states had still been allowed to determine the eligibility of their residents to vote. The Framers direct-

ly confronted an analogous problem, that of having a direct popular vote for president while allowing each state to determine its own rules for suffrage. "There was one difficulty however of a serious nature attending an immediate choice [i.e. popular vote] by the people [for president]. The right of suffrage was much more diffusive [i.e. widespread] in the Northern than the Southern States . . . The substitution of electors obviated this difficulty and seemed on the whole to be liable to the fewest objections." 2 Farrand's Records: The Records of the Federal Convention of 1787, at 57 (Max Farrand ed.) (1911).

In other words, simply by virtue of having a more liberal voting rule, northern states would have contributed more votes to the national total. Under such a system "a state's incentive to extend suffrage would no longer affect just that state." Muller, *Invisible Federalism*, 44 Ariz. St. L.J. at 1268. The natural concern is that states would "have incentives to change their own eligible voting population as a reaction to what another state has done," *id.*, and soon find themselves in a "race to the bottom," extending the franchise to younger and younger children, the mentally ill, and others who ought not wield it, all to gain an advantage in national elections. Such a system would clearly have been unacceptable.

Madison's federalist principle is the answer to the analogous problem in the House. It is the response to a hypothetical northerner, who objects to counting nonvoters in apportionment such as slaves who "neither vote themselves nor increase the votes of their masters. Upon what principle, then, ought they to be taken into the federal estimate of representation?" *Federalist* 54. Madison justifies his principle by noting that "[t]he qualifications on which the right of

suffrage depend are not, perhaps, the same in any two States. In some of the States the difference is very material." *Id.* This is why "the principle laid down by the convention required that no regard should be had to the policy of particular States towards their own inhabitants." *Id.* The allocation of representatives by total population, analogously to the allocation of presidential electors by total population, eliminated the problem of incentivizing states to gain greater representation in Congress simply by expanding their voting laws.

2. The Framers were correct to choose a federalist system of voter qualification over voter equality.

The Framers could have taken a different path than the one they chose, establishing a uniform criterion of voter eligibility nationwide and allocating representatives to states by eligible voters. The Convention did see a proposal to define a uniform standard of suffrage in House elections nationwide, limiting it only to freeholders. 2 Farrand at 201. But such a federal standard "would prevent the states from serving as the institutions that are most inclined to extend suffrage to new voters, as is historically the case, and would stifle the opportunity for new enfranchisement." Muller, *Invisible Federalism*, 44 Ariz. St. L.J. at 1265. Had we taken that path, Wyoming could not have extended the franchise to women as a territory in 1869 and upon statehood in 1890, paving the way to national acceptance. Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 Nw. U. L. Rev. 1229, 1260 (2000).

The federalist system of congressional elections instead "permitted states to act as the first movers in

the expansion of enfranchisement," *id.* at 1254, the benefits of which ability were keenly felt when "the right to vote for African-Americans, women, and eighteen-year-olds were pioneered in state constitutions before their incorporation into the federal charter." G. Alan Tarr, *Explaining Sub-National Constitutional Space*, 115 Penn St. L. Rev. 1133, 1147 (2011) (citing Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (2000)). Recognizing the importance of allowing states to be such first movers, the Framers rejected the proposal for a nationwide standard of suffrage. 2 Farrand at 206.

3. No similar federalist concerns exist at the intra-state level.

Because cities and counties do not have the same autonomy as states, such concerns about federalism are completely inapposite at the state level. No state allows different counties to define the franchise differently for state legislative elections. Indeed, the Constitution in defining suffrage for U.S. House elections assumes that the qualifications for voting for a state legislative branch will be uniform across a state, in that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature," U.S. Const. Art. I, § 2, cl. 1. In Texas, as in all 50 states, the qualification for voting in state legislative elections is determined by state law, not local law. *See* Tex. El. Code Ann. § 11.002.

This Court has already recognized that states have no justification for using an electoral-college system rather than a popular vote in elections for statewide offices. *Gray v. Sanders*, 372 U.S. at 381.

The total population rule, just like the electoral college, is a solution to a purely federal problem.

C. The Federal Rule Was Intimately Tied to State Taxation

1. Apportionment by population checked the incentive to underreport population for tax purposes.

Why did the Constitution establish a rule that both representatives and direct taxes would be apportioned by the same standard, total population? In the Federalist Papers, Madison provides an explanation:

> As the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree on the disposition, if not on the co-operation, of the States, it is of great importance that the States should feel as little bias as possible, to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests, which will control and balance each other, and produce the requisite impartiality.

Federalist 54.

This Court has previously recognized the importance of such opposing interests. "The establishment of the same rule for the apportionment of taxes as for regulating the proportion of representatives . . . [was done partially so] the opposite interests of the states, balancing each other, would produce impar-

tiality in enumeration." *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, 564 (1895) (citing *Federalist* 54). Total population, not voter population, was thought the fair measure for direct taxes, since population "had reference to the proportion of wealth." *Id.* (citing *Federalist* 54).

As it turned out, the mechanism largely did not work as the Framers intended. Federal direct taxes were "occasional and rare," imposed only three times in the first 40 years of the Constitution. I J. Story, Commentaries on the Constitution § 642 (5th ed. 1891). In fact, "[t]he last apportioned direct tax was the Act of Aug. 5, 1861, ch. 45, (12 Stat.) 292." Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clause)*, 21 Const. Comment. 355, 357 n.7 (2004). It was partially because of the rarity of direct taxes that the Fourteenth Amendment's framers were willing to enact a rule that partially delinked taxation from representation. *See, e.g.*, Globe at 3033 ("If I believed it probable that direct taxation would be resorted to in the future legislation of the country, nothing could induce me to support this proposition.") (statement of Sen. Henderson).

Eventually, the Constitution was amended to largely abandon this system of opposing state interests in enumeration altogether, allowing income taxes to be collected "without apportionment among the several States, and without regard to any census or enumeration." U.S. Const. Amend. XVI. Nonetheless, the fact that the original purpose of a constitutional design is no longer relevant should not obscure an understanding of what the original design *was*—which here in large part was a design motivated by fair taxation and incentives for fair census-taking, *not* a particular theory of representational equality.

2. Linking representation and taxation increased support for the Three-Fifths Compromise.

Records from the Constitutional Convention also show that linking congressional apportionment to taxation was inspired, in part, as a way to cement the Three-Fifths Compromise. Jensen, *Interpreting the Sixteenth Amendment*, 21 Const. Comment. at 375 (citing 2 Farrand at 106). Northerners could take solace that partially counting slaves also meant the South would pay more in direct taxes. Southerners were less eager to increase the ratio to five-fifths, knowing that doing so would also increase their direct taxes. "The controversy was therefore settled by imposing direct taxation upon the States in the same proportion in which they might be represented upon their slave population." Globe at 3033 (statement of Sen. Henderson). Although once again this purpose is no longer relevant today—and indeed may rightfully be seen as rather sordid—it sheds light on the motivations behind the constitutional design we have.

3. No such concerns are operative today at the state level.

There were several factors that produced the rule that ultimately arose from the Constitutional Convention, that representation in Congress and direct taxes would be mutually linked to total population. But the lesson this Court can take from these complexities is a very simple one: absolutely none of these issue, concerns, or compromises have any relation to the workings of the Texas government of 2015. Neither Texas nor any other state imposes direct taxes on its various subdivisions by total population. It was already recognized in 1866 that no state had bor-

rowed the federal Constitution's model, that "[i]t has been adopted in no State, in no county, in no town, in no municipal corporation, of apportioning taxation according to population." Globe at 378 (statement of Rep. Sloan). Nor has Texas suggested that chronic underreporting of population figures in its subdivisions might be a serious problem, one that would require the reward of representation based on total population to counteract.

D. The Federal Rule Was Preserved in 1866 to Ensure Virtual Representation for Women, not Aliens

1. The Fourteenth Amendment rejected a theory of virtual representation for nonvoting blacks.

"Virtual representation" is the democratic theory that where one person votes with the interests of both himself (gendered pronoun alas intentional) and other particular nonvoters in mind, the weight of his vote should somehow be increased to reflect the full number of those he is virtually representing. "The founding generation used concepts of virtual representation to . . . enabl[e] one entity to speak for—to virtually represent—another, larger one." Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1075 n.117 (1988).

Since the nation's founding, the concept of virtual representation for disenfranchised persons has been in an uneasy tension with the principles that led to the Revolution. "To say that men could be fairly represented by those whom they had played no part in choosing rang just as false as the royal claim that the colonists were adequately, if virtually, represented by

British members of Parliament." Keyssar, The Right to Vote 12 (revised ed. 2009). The legitimacy of virtual representation is, nonetheless, a necessary prerequisite to the legitimacy of justifying population-based districts on democratic grounds, since "the conclusion that [representing all interests equally] requires total population-based districting plans assumes that the non-voters in a district are 'virtually' represented by the voters in their district." Scot A. Reader, *One Person, One Vote Revisited*, 17 Harv. J.L. & Pub. Pol'y 521, 557–58 (1994).

Justice Harlan has gamely attempted to attribute a theory of virtual representation to the Framers' choice to (partially) include nonvoting slaves in the enumeration that determined state representation. "[I]t might have been thought that Representatives elected by free men of a State would speak also for the slaves. But . . . Representatives from the slave States could have been thought to speak only for the slaves of their own States, indicating . . . that the Convention believed it possible for a Representative elected by one group to speak for another nonvoting group." *Wesberry*, 376 U.S. at 27 (Harlan, J., dissenting). Derek Muller similarly suggests that "the Electoral College was founded upon a kind of republican vision of virtual representation in which a number of residents (including women, children, aliens, nonproperty owners, and, in part, slaves) would be included in a state's population tally." Muller, *Invisible Federalism*, 44 Ariz. St. L.J. at 1243. It is more likely that the (at least northern) Framers never truly believed the interests of slaves to be aligned with their masters, and only supported assigning slaves any weight in a state's enumeration out of expediency. But regardless, the *effect* of the Three-Fifths Com-

promise was indisputably one of virtual representation, since "[t]he power thus agreed upon could not be exercised by the fractional persons themselves, but as somebody else owned them, it was arranged that that same somebody else should own the political power also." Globe at 365 (statement of Rep. Conkling).

After the Civil War, when those slaves had been freed from any formal paternalistic relationship to their former owners, and had political interests that were diametrically opposed to those former owners, the notion of their being "virtually represented" by white voters went from dubious to patently absurd. Yet, without a change to the constitutional rule at the time, "the disenfranchised but freed slaves would count not as three-fifths in the apportionment of House seats but as five-fifths." Mark S. Scarberry, *Historical Considerations and Congressional Representation for the District of Columbia*, 60 Ala. L. Rev. 783, 819–20 (2009).

Members of Congress from free states that had little to no black populations, realizing the inequality in voting strength that would result, asked "in fairness, why should two Marylanders count equal to three Iowaians [sic]?" Globe at 767 (statement of Sen. Kirkwood). *Cf. id.* at 434 (statement of Rep. Ward); *id.* at 1255 (statement of Sen. Wilson). Rep. Donnelly analogized the outsized voting strength of white men in states with large black populations to the "rotten borough system" of the English Parliament. *Id.* at 377.

In response, some Democratic allies of the southern states, citing virtual representation principles, continued to make "the startling claim that members of Congress elected by white voters provided virtual representation for blacks, and thus a failure to pro-

vide representation for the black population would be taxation without representation." Scarberry, *Historical Considerations*, 60 Ala. L. Rev. at 842. One such claim was the speech of Rep. Phillip Johnson of Pennsylvania, who declared that reducing a state's representation by its number of nonvoting blacks would be to "limit the class of persons who shall be represented [in Congress] to white male adults" and "take away from the entire negro population, now all free alike, all representation whatever." Globe app. at 55 (1866). In the very same address, Rep. Johnson made appeals to a theory of virtual representation that would not sound wholly out of place coming from supporters of representational equality of populations (as opposed to voter equality) among legislative districts today. (Of course, knowing they were made in the context of freed blacks in the Reconstruction South, these sentiments now rightfully appear either hopelessly naive or disingenuous.)

> A faithful member of Congress represents the whole population of his district, male and female, black and white . . . If he relies wholly upon the voters of his district for the expressed wish of his whole constituency he may err, but not unless the voters are unfaithful representatives of the population behind them. And this is not likely to happen, because men's wishes, when intelligibly made, are found to be with their interests. The vote of the husband is supposed to represent the interests of his wife, and so the father those of his children, and these aggregated make up the public weal, commonwealth, or *respublica*.

Id.

Rep. Rogers of New Jersey spoke in similarly glowing terms of the principle of full representation for all persons, disenfranchised or not. "What is there more democratic and republican in the institutions of this country than that the people of all classes, without regard to whether they are voters or not, white or black, who make up the intelligence, wealth, and patriotism of the country, shall be represented in the councils of the nation." *Id.* at 353. *Cf. Daly v. Hunt*, 93 F.3d 1212, 1226 (4th Cir. 1996) ("[R]epresentatives should represent roughly the same number of constituents, so that each person, whether or not they are entitled to vote, receives a fair share of the governmental power, through his or her representative."); *Calderon*, 481 P.2d at 493 ("Adherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government.")

But the enactors of the Fourteenth Amendment *rejected* these arguments of representational equality as being in the best interest of freed slaves, recognizing that under the then-current system "the negro of the South . . . has his vote cast for him . . . by his white and hardly more loyal neighbor," Globe at 2498 (statement of Rep. Broomall), and that "if men have no voice in the national Government, other men should not sit in this Hall pretending to represent them." *Id.* at 377 (statement of Rep. Donnelly). The enactors thus explicitly included in that amendment the *only* exception to the federal rule that congressional seats are allocated by total population. "But when the right to vote at any election for . . . Representatives in Congress . . . is denied to any of the

male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." U.S. Const. Amend. XIV, § 2.

In other words, if a state did not allow blacks to vote, and blacks represented 40% of adult male citizens, the congressional allocation would be based on the total population of the state decreased by 40%. Thus, the only time that drafters of the federal rule confronted a situation where nonvoters would obviously not be virtually represented, and were not guaranteed to obtain the vote in a definite period of time, the drafters eliminated those nonvoters from the apportionment calculus. As we show *infra*, Part I.D.3, these criteria have come to perfectly describe the position of aliens today.

2. The Fourteenth Amendment retained the population rule to ensure women would be represented.

Why, with the theory of virtual representation so clearly repudiated in the case of freed slaves, did the Fourteenth Amendment not move fully to a voter-based system of apportionment? Such proposals were made and debated. "[W]e have had several propositions to amend the Federal Constitution . . . all embrac[ing] substantially the one idea of making suffrage instead of population the basis of apportioning Representatives; or in other words, to give to the States in future a representation proportioned to their voters instead of their inhabitants." Globe at

141 (statement of Sen. Blaine). *See* proposals of Rep. Schenck, *id.* at 9, Rep. Stevens, *id.* at 10, Rep. Broomall, *id.*, Rep. Sloan, *id.* at 378, Rep. Orth, *id.* at 380–81, and Sen. Doolittle, *id.* at 2942.

In support of retaining the population-based rule, Sen. Hendricks defended the theory of virtual representation, but *only* in the context of family members, not aliens. "The theory is that fathers, husbands, brothers, and sons to whom the right of suffrage is given will in its exercise be as watchful of the rights and interests of their wives, sisters, and children who do not vote as of their own." *Id.* at 2962. Similarly, Sen. Fessenden, chairman of the amendment's drafting committee, suggested that wives plausibly had tangible effects on the votes of husbands in a way that nonvoters outside the family structure did not have, and thus were fairly counted in representation. "I could hardly stand here easily if I did not suppose I was representing the ladies of my State. I know, or I fancy I know, that I have received considerable support from some of them, not exactly in the way of voting, but in influencing voters." *Id.* at 705.

With the virtual representation of women in mind, Sen. Hendricks voiced objection to a voter-based system of representation because "new States to a great extent are settled by emigration from the older States, and it has been and will ever continue to be the case that a much larger proportion of this emigration are male. The consequence is that the newly settled States contain a very much larger proportion of males than the older States, and therefore a much larger ratio of voters." *Id.* at 2962. According to Sen. Blaine, who likewise opposed changing the rule, this disparity was indeed substantial, with "[t]he ratio of voters to population . . . varying in the [nineteen free

states] from a minimum of nineteen per cent. to a maximum of fifty-eight per cent." *Id.* at 141. It was thus primarily for the protection of virtual representation for nonvoting women (read: wives) that the population basis for apportionment was retained in 1866, *not* for the virtual representation of aliens.

3. Aliens were retained in apportionment for several reasons unrelated to virtual representation.

Does the continued inclusion of nonvoting aliens in the allocation of representatives lend support to a notion that the drafters of the Fourteenth Amendment *did* think that aliens were virtually represented? In fact, George Smith provides a representative list of 12 instances where the issue of aliens in apportionment was discussed in congressional debate over Section 2, by supporters and opponents of the amendment alike, and in *none* of these instances is it suggested that aliens' interests were virtually represented by voters living near them, nor that aliens' interests were served by maintaining state "representational equality." Smith, *Republican Reconstruction and Section Two*, 23 Western Pol. Q. at 851 n.146.

First and foremost, congressional debate shows that nonvoting aliens were kept in a state's apportionment total for precisely the reasons discussed in Part I.B., *supra*. To do otherwise would have been to give states an incentive to grant the vote to as many of its resident aliens as possible. This rationale was explicitly put forward in opposition to suffrage-based representation multiple times. "There would be an unseemly scramble in all the States during each decade to increase by every means the number of voters, and all conservative restrictions, such as the re-

quirement of reading and writing now enforced in some of the States, would be stricken down in a rash and reckless effort to procure an enlarged representation in the national councils. Foreigners would be invited to vote on a mere preliminary 'declaration of intention.'" Globe at 141 (statement of Sen. Blaine). Similarly, Rep. Conkling, a member of the drafting committee, suggested that "[i]f voters alone should be made the foundation of representation . . . [o]ne State might let women and minors vote. Another might . . . give the ballot to those otherwise qualified who have been resident for only ten days. Another might extend suffrage to aliens. This would lead to a strife of unbridled suffrage." *Id.* at 357. And Sen. Fessenden, the chairman, likewise worried of "an unseemly race between States to increase their political power by increasing the number of their voters." *Id.* at 705.

Once again, establishing a uniform nationwide standard of the franchise would have been necessary to solve this problem, as one proponent of moving to suffrage-based representation fully admitted when he proposed an amendment "making the qualification universal . . . that qualified male electors, citizens of the United States of the age of twenty-one years and upward, shall be the basis of representation." *Id.* at 378 (statement of Rep. Sloan). But once again, for reasons of federalism, "there was considerable opposition within both the Committee itself and Congress as a whole to any measure that would strip the states of their power to control suffrage and elections. . . . [T]he Committee rejected two proposals that would have given Congress express control over 'elective' rights and 'the elective franchise.'" Mark R. Killenbeck & Steve Sheppard, *Another Such Victory? Term Limits, Section 2 of the Fourteenth Amendment, and*

the Right to Representation, 45 Hastings L.J. 1121, 1178 (1994) (citations omitted).

Rep. Bingham, the committee member considered the primary author of the Fourteenth Amendment, felt the need to reassure that "this amendment takes from no State any right that ever pertained to it. . . . The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States." Globe at 2542. Likewise in the Senate, Sen. Howard stressed that "[t]he second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right." *Id.* at 2766.

Further, nonvoting aliens were not treated as a serious democratic problem by the drafters of the Fourteenth Amendment because it was assumed that all would, after a fairly short and uniform period of time, become citizens and therefore voters. Rep. Conkling remarked that, at the founding, the question of "how [aliens] should be treated during the interval between their arrival and their naturalization, during their political nonage . . . was disposed of in the liberality in which the Government was conceived. The political disability of aliens was not for this purpose counted at all against them, *because it was certain to be temporary*, and they were admitted at once into the basis of apportionment." *Id.* at 356 (emphasis added).

In 1866, many states actually allowed aliens to vote even *before* they had attained citizenship. "Up to 1875 over half the states allowed aliens to vote if they met certain other requirements, like residence." Peter Odegard, The American Republic 76 (1964). This progress toward the franchise was put forward as the

reason for counting aliens *in contrast to* the virtual-representation justifications for counting women. "The road to the ballot is open to the foreigner; it is not permanently barred. It is not given to the woman, because it is not needed for her security. Her interests are best protected by father, husband, and brother." Globe at 3035 (Sen. Henderson).

More specifically, since enumerations were taken only every 10 years, it was assumed that most of those aliens counted would become voters before the next census. Rep. Kelley asked with rhetorical understatement "whether it is not possible that the male minor may come to an age that will secure him the right to vote; and whether it is not possible for the unnaturalized foreigner also to acquire that right; and whether . . . both may acquire it in the current decade." *Id.* at 354. Rep. Kelley explicitly contrasted the position of the nonvoting alien with that of the "freeman who can *never* vote [and who] should not be counted among voters and possible voters in fixing the basis of suffrage." *Id.* Both opponents and supporters of treating aliens differently from freed slaves agreed that five years was at the longest end of potential waits for the vote. *See id.* at 2939 ("[I]n some of the Northern states the foreigner is denied a vote for five years.") (statement of Sen. Johnson); *id.* at 2987 ("Nearly all the men who come to this country are naturalized in five years.") (statement of Sen. Sherman). Thus, the drafters of the Fourteenth Amendment did not have in mind a conception of aliens as those who might inhabit a state of residency without progress toward citizenship lasting for decades, a picture that, unfortunately, has evolved to become a common reality in 2015.

Most bluntly, Rep. Conkling also admitted that "many of the large States now hold their representation in part by reason of their aliens, and the Legislatures and people of these states are to pass upon the amendment. *It must be made acceptable to them.* For these reasons the committee has adhered to the Constitution as it is, proposing to add to it only so much as is necessary to meet the point aimed at." *Id.* at 359 (emphasis added). *See also id.* at 537 ("I do not think it would be wise to . . . send to the people a proposition to amend the Constitution which would take such Representatives [founded upon noncitizens] from those States, and which therefore they will never adopt.") (statement of Rep. Stevens). The fact that aliens are still retained in the apportionment totals for House members thus may have a great deal more to do with politics (of 1866) than with principle, further weakening the strength of any federal analogy.

4. Aliens are not "virtually represented" by voters who happen to live near them.

The example of the Reconstruction South puts in stark display the absurdity of the notion that geographic proximity will always have a high correlation with political interests. Sometimes the political views of voters and nonvoters who live near each other will be diametrically opposed. And this is still true even when (as has become more frequently the case since courts have aggressively enforced their interpretation of Section 2 of the Voting Rights Act above all other concerns) a district is largely racially homogenous.

This Court has always conditioned an assumption that voters of one race virtually represent other voters of the same race upon an empirical finding that

racial bloc voting is, in fact, already taking place. *See, e.g., United Jewish Organizations v. Carey*, 430 U.S. 144, 166 n.24 (1977) ("[T]he white voter who . . . is in a district more likely to return a nonwhite representative will be represented, *to the extent that voting continues to follow racial lines*, by legislators elected from majority white districts.") (White, J., plurality op.) (emphasis added). This Court's test for determining that a racial group is being electorally underrepresented requires showing "the existence of a correlation between the race of voters and the selection of certain candidates." *Thornburg v. Gingles*, 478 U.S. 30, 74 (1986). But, of course, an examination of voting patterns cannot show the existence of a correlation between the political preferences of voters and nonvoters of the same race. Allowing Texas to assume that its ineligible voters will share the political preferences of eligible voters of the same race would, then, be the first time this Court has endorsed a belief that homogenous racial-bloc political preferences are inevitable and need no empirical verification.

It is plausible that eligible and ineligible voters of the same race would often *not* be identical in political preferences. We can imagine, for example, a hypothetical heavily Hispanic state senate district in Texas. Suppose this district is a mix of nonvoting aliens, recently naturalized citizens, and second-or-third-generation Americans of Spanish descent. On issues such as whether immigration queues to enter the country should be strictly enforced and the extent to which Texas should police its border with Mexico, can we assume the political opinions of everyone in each of these groups will be aligned? Or is it more plausible that a not-insignificant percentage of Hispanic citizens will vote on immigration issues in a way that

is completely opposed to the interests of *nonvoting* Hispanics? If so, counting those alien Hispanics in the total for apportioning voting strength to the *voting* Hispanics near them may hurt their political interests in exactly the same way that counting nonvoting blacks in the apportionment of House members to be elected by southern whites would have harmed the interests of those nonvoting blacks.

Using unfranchised persons to give greater political power to franchised persons is, then, a dangerous game that can cut both ways. Neither the hope that neighbors will always share a desire for local pork projects nor superficial political sterectyping based on race are enough to justify allowing certain citizens to "own the political power" of those who live near them.

5. Concerns for representing nonvoting women are no longer relevant.

Since the enfranchisement of women, the representative concern that actually motivated the drafters of the Fourteenth Amendment no longer carries any weight. Where men spoke for women, biasing representation to states with more males, and therefore more voters, would have underrepresented the (implicit) voices of women in the states in which they lived in greater numbers. There is no analogous principle supporting greater voting power for residents of districts with large numbers of resident aliens. A detailed examination of the history of the passage of the Fourteenth Amendment shows that it outright rejected one claim of virtual representation (that of former slaves) and included aliens for concerns entirely apart from virtual representation, which have no analogy at the state level.

E. The Federal Rule Does Not Result in Voting Strength Disparities of the Same Scale as the Texas Plan

1. The larger size of states naturally inclines them toward heterogeneity.

Finally, it is worth actually comparing the disparities at the inter-state level caused by the federal rule to those caused by Texas's proposed districting plan S172, to see if the *results* are as analogous as Texas claims the *purposes* are. After controlling for the fact that states must be allocated representatives in whole numbers,[2] the following chart shows the five most overrepresented and five most underrepresented states in the House of Representatives in terms of voter population in 2014, along with the U.S. average. (Data from Pew Hispanic, *Mapping the Latino Electorate by State*, http://www.pewhispanic.org/interactives/mapping-the-latino-electorate-by-state/.)

---

[2] For example, Montana's population of 1,005,000 receives only one representative, while Rhode Island's population of 1,050,000 receives two, which affects both the figures for representatives per person and representatives per voter. To eliminate the effects of this unrelated issue, the data has been "equalized" to reflect the number of voters each state would have, keeping the ratio of eligible voters to nonvoters in each state the same, if each state's total population were exactly 721,641 people per representative, the national average.

FIGURE 1

State	% Eligible Voters	Eligible Voters per Representative (equalized for rounding issues)	% of Ideal State
California	62.6	451,887	89.3
Texas	63.5	458,257	90.6
Utah	64.2	463,569	91.6
Nevada	66.1	477,084	94.3
Arizona	67.7	488,619	96.6
U.S. Average	70.1	506,002	100
New Hampshire	76.8	553,932	109.5
Montana	77.4	558,644	110.4
Maine	78.6	566,888	112
West Virginia	78.7	567,587	112.2
Vermont	78.8	568,321	112.3

This Court's "decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within th[e] category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State." *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983). Even if this standard were applied to eligible voter population rather than total population, only five of the fifty states would have disparities from the mean large enough to raise judicial scrutiny (California being the only state that

would receive scrutiny for overrepresentation). None come near the 16.4% discrepancy that "may well approach tolerable limits" of constitutionality in other contexts, even with compelling justifications. *Mahan v. Howell*, 410 U.S. 315, 329 (1973).

2. One fifth of the Texas districts are more malapportioned than the most malapportioned state.

When we compare this to the disparity that arises between districts within Texas, we see that it is a disparity of an entirely different magnitude. Using the most recent CVAP data available, we can once again look at the five most underrepresented and overrepresented districts among the 31 total senate districts drawn up under plan S172. (Data for this and the following chart comes from ACS, *Plan S172 Special Tabulation 2009–2013* ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED116_ACS_Special_Tabulation_2009-2013.pdf).

FIGURE 2

District	% CVAP	CVAP	% of Ideal District
6	47.2	383,985	73.5
27	50.8	399,530	76.5
13	52.9	427,820	81.9
23	57.4	466,660	89.3
29	57.4	469,130	89.8
Texas Average	64.4	522,508	100
1	71.2	583,460	111.7
5	70.7	584,895	111.9

30	72.2	598,630	114.6
25	73.8	602,120	115.2
3	72.5	611,435	117

The Texas plan has a total of 11 out of 31 districts that fall more than 10% above or below the statewide average in CVAP. Four districts fall outside the *Mahan* range of justifiability. Even though there are only 31 districts, compared to 50 states, three districts are more overrepresented than the most overrepresented state, and likewise three districts are more underrepresented than the most underrepresented state. Most strikingly, the plan includes two districts, 6 and 27, that fall below the ideal CVAP by *more than double* the percentage points that California, the most overrepresented state in the country, falls below the ideal U.S. state.

It is true that the districts under plan S172 do vary (all within the well-established 10% range) by *total* population as well as CVAP population, and that part of the disparities in the totals for CVAP are caused by the disparities in total population, not in percent CVAP. The legislature bears more responsibility for these differences in total population than does the U.S. Congress for the disparities caused by the rounding of representatives to states by whole numbers—but even if we again equalize the districts to reflect CVAP they *would have* if their total populations were perfectly equal, we see that barely a dent would be made in the CVAP disparities.

FIGURE 3

District	% CVAP	CVAP (Total Population Equalized)	% of Ideal District
6	47.2	383,166	73.3
27	50.8	411,817	78.8
13	52.9	429,125	82.1
23	57.4	465,196	89
29	57.4	465,951	89.2
Texas Average	64.4	522,508	100
28	71.8	582,436	111.5
30	72.2	585,333	112
24	72.4	587,516	112.4
3	72.5	587,936	112.5
25	73.8	598,707	114.6

3. State boundaries cannot be gerrymandered to create "grossly absurd and disastrous results."

This Court has previously recognized that "grossly absurd and disastrous results would flow" in some cases from using total population to draw state legislative boundaries, such as where military bases fluctuate wildly in population and "permanent residents living in districts including [such] bases might have substantially greater voting power than the electors of districts not including such bases." *Burns v. Richardson*, 384 U.S. 73, 94 & n.24 (1966). A similar issue

is that "[i]neligible incarcerated felons, for instance, are typically counted for apportionment purposes in the prisons where they are incarcerated." Robert W. Bennett, *Should Parents Be Given Extra Votes on Account of Children?*, 94 Nw. U. L. Rev. 503, 511 (2000). There will never be a statewide prison or a statewide military base, nor could any politician create one, since the boundaries of states, unlike the boundaries of state legislative districts, cannot be gerrymandered. But without the intervention of this Court in providing a voter-based standard of apportionment for state legislative districts, nothing would prevent a creative legislator from drawing exactly such a district *within* a state, and potentially giving control over the election of a state representative to as small and select a group of voters as he or she wishes. This possibility again draws a stark *dis*analogy between the apportionment rule as it must play out at the federal level, and as it could play out at the state level.

II. "ENFORCING" THE VOTING RIGHTS ACT DOES NOT JUSTIFY ABRIDGING ONE PERSON, ONE VOTE[3]

Once again this Court finds itself at the intersection of the VRA and the Fourteenth Amendment. The parties here are caught in the inevitable trap of (1) maintaining majority-minority districts under complex, overlapping standards and (2) administering electoral schemes that do little to advance racial equality while doing much to violate *voter* equality—the idea that each eligible voter's vote should count

---

[3] This argument is set forth in more detail in *amici*'s brief supporting the Appellants' jurisdictional statement, available at http://object.cato.org/sites/cato.org/files/pubs/pdf/evenwel-filed-brief.pdf.

equally. In the background of this conflict lurks a cacophony of precedent and conflicting judicial standards that have arisen from Section 2 cases. Basic constitutional guarantees of equal protection inherent in the Fourteenth Amendment—such as "one person, one vote" (OPOV)—get lost in this thicket.

Avoiding racial discrimination under these circumstances is particularly difficult in jurisdictions where total population and CVAP diverge due to varied concentration of noncitizens. As with the tensions *amicus* Cato has described before, jurisdictions navigating between the VRA's Scylla and the Constitution's Charybdis are bound to wreck individual rights—here, voter equality—on judicial shoals.[4]

Over the years, courts, including this Court, have repeatedly recognized the potential for devaluing individual votes by drawing majority-minority districts in a manner that accords greater weight to minority votes in protected districts and diminishes the relative weight of voters elsewhere. *See, e.g., Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015). Even the Fifth Circuit recognized this danger while ultimately ruling the other way. *Chen*, 206 F.3d at 528 ("[T]he propriety under the Equal Protection Clause of using total population rather than a measure of potential voters also presents a close question."). Nevertheless, here the special district court panel adhered to that flawed lower-court precedent—tepidly refusing to acknowledge CVAP as integral to OPOV and thus a requisite element of constitutional

---

[4] *Amicus* Cato has previously argued that courts faced a "bloody crossroads" when interpreting Sections 2 and 5 of the VRA. *See, e.g.*, Brief of Cato Inst. as *Amicus Curiae* at 20-28, *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); Brief of Cato Inst. as *Amicus Curiae* at 29-32, *Perry v. Perez*, 132 S. Ct. 934 (2012).

equal protection. At least one member of this Court has already recognized the urgency of the problem: "Having read the Equal Protection Clause to include a 'one-person, one-vote' requirement, and having prescribed population variance that, without additional evidence, often will satisfy the requirement, we have left a critical variable in the requirement undefined." *Chen v. City of Houston*, 532 U.S. 1046, 1047 (2001) (Thomas, J., dissenting from denial of certiorari).

Section 2 and the Fourteenth Amendment have thus reached an impasse that has been highlighted by a conflict among lower courts' application of OPOV. *See Chen*, 206 F.3d 502; *Lepak v. City of Irving*, 453 Fed. Appx. 522 (5th Cir. 2011); *Daly v. Hunt*, 93 F.3d 1212; *Garza*, 918 F.2d 763. This Court has clearly left pending a substantial question regarding the continued viability of OPOV and voter equality under the Fourteenth Amendment. Accordingly, this Court should resolve that conflict once and for all—by explaining the proper use of different population metrics and saving OPOV from the judicial morass the VRA has become.

CONCLUSION

For the foregoing reasons, and those described by the Appellants, this Court should reverse the lower court's judgment.

Respectfully submitted,

Manuel S. Klausner
LAW OFFICES OF MANUEL S. KLAUSNER
One Bunker Hill Building
601 W. Fifth St., Ste. 800
Los Angeles, CA 90071
(213) 617-0414
mklausner@mac.com

Ilya Shapiro
Counsel of Record
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

August 7, 2015

Supreme Court, U.S.
FILED
AUG - 7 2015
OFFICE OF THE CLERK

No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL AND EDWARD PFENNINGER,
Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY
AS GOVERNOR OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF APPELLANTS

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
jeastman@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

QUESTION PRESENTED

In light of this Court's holding in *Reynolds v. Sims*, 377 U.S. 533, 579 (1964), that the Equal Protection Clause of the Fourteenth Amendment requires voting districts to be drawn so "that the vote of any citizen is approximately equal in weight to that of any other citizen in the State," is it unconstitutional for a State to significantly dilute the votes of some citizens to the benefit of other citizens by drawing districts based on total population, including those who are residing in this country unlawfully and are therefore not part of the body politic?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. This Court's "One-Person, One-Vote" Jurisprudence Has Rightly Focused on *Voters* and *Citizens*. 2

II. The Political Theory of the Founding, Embodied in Both the Declaration of Independence and the Constitution, Fully Supports Voter-Based Reapportionment. 8

A. The Declaration of Independence established a "People," and it is that People whose consent is necessary for the legitimacy of the government they established. 8

B. The Constitution's preamble and "Indians Not Taxed" clause also support a Citizen/Voter-based interpretation of the one-person, one-vote rule. 10

III. The Civil War Amendments Themselves Give Heightened Protection to "Citizens," Recognizing the Importance of Membership in the Body Politic For the Exercise of Political Rights 12

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Ambach v. Norwich,
441 U.S. 68 (1979) 15

Baker v. Carr,
369 U.S. 186 (1962) 2

Board of Estimate v. Morris,
489 U.S. 688 (1989) 3

Boyd v. Thayer,
143 U.S. 135 (1892) 14

Burns v. Richardson,
384 U.S. 73 (1966) ..... passim

Bush v. Gore,
531 U.S. 98 (2000) 4

Cherokee Nation v. State of Ga.,
30 U.S. 1 (1831) 11

Connor v. Finch,
431 U.S. 407 (1977) 6

Dunn v. Blumstein,
405 U.S. 330 (1972) 15

Elk v. Wilkins,
112 U.S. 94 (1884) 11

Foley v. Connelie,
435 U.S. 291 (1978) 12, 14, 16

Gaffney v. Cummings,
412 U.S. 735 (1973) 6

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1990) 5, 8

Gray v. Sanders,
372 U.S. 368 (1963) 3

Hadley v. Junior College Dist.,
397 U.S. 50 (1970) 4

Lockport v. Citizens for Community Action,
430 U.S. 259 (1977) 4

Mahan v. Howell,
410 U.S. 315 (1973) 6

Nyquist v. Mauclet,
432 U.S. 1 (1977) 14

Perkins v. Smith,
370 F.Supp. 134 (Md.1974), *aff'd*,
426 U.S. 913 (1976) 14

Pope v. Williams,
193 U.S. 621 (1904) 14

Reynolds v. Sims,
377 U.S. 533 (1964) .....passim

Sugarman v. Dougall,
413 U.S. 634 (1973) 14, 15

United States v. Carolene Products Co.,
304 U.S. 144 (1938) 15

United States v. Kagama,
118 U.S. 375 (1886) 12

Vieth v. Jubelirer,
541 U.S. 267 (2004) 4

Wesberry v. Sanders,
376 U.S. 1 (1964) 3, 7

WMCA, Inc. v. Lomenzo,
238 F. Supp. 916 (S.D.N.Y. 1965), *aff'd*,
382 U.S. 4 (1965) 5

Worcester v. Georgia,
6 Pet. (31 U.S.) 515 (1832)..... 12

Statutes, Organiz Law, and Constitutional Provisions

Civil Rights Act of 1866 § 1, ch. 31, 14 Stat. 27..... 13

Decl. of Ind. ¶ 1 9

Decl. of Ind. ¶ 2 9

U.S. Const. Amend. XIV, § 1..... 13

U.S. Const. Amend. XIV, § 1 (Equal Prot.) .....passim

U.S. Const. Amend. XIV, § 2..... 11, 16

U.S. Const. Amend. XIX 16

U.S. Const. Amend. XV..... 15

U.S. Const. Amend. XXIV..... 16

U.S. Const. Amend. XXVI..... 16

U.S. Const. Art. I, § 2, cl. 3 11

U.S. Const., Preamble..... 10

Other Authorities

Cong. Globe, 39th Cong., 1st Sess., 141-42, 2766-67 (1866) 15

Cong. Globe, 39th Cong., 1st Sess. 2893 (1866)..... 13

Cong. Globe, 39th Cong., 1st Sess. 2895 (1866)..... 13

Jefferson, Thomas, Autobiography (1821), in Paul Leicester Ford, ed., THE WORKS OF THOMAS JEFFERSON, Vol. I:43-57 (1904), *reprinted in* Philip B. Kurland & Ralph Lerner, THE FOUNDERS' CONSTITUTION, Vol. 2, p. 87 (1987) 11

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, the stated mission of which is to restore the principles of the American founding to their rightful and preeminent authority in our national life. One of the most important of those principles is the idea that legitimate governments derive their just powers from the consent of the governed, and the Center has participated in numerous cases before this Court and elsewhere that involve one or another application of that principle, including *Sisney v. Reich*, 131 S.Ct. 2149 (2011); *Angle v. Guinn*, 541 U.S. 957 (2004); and *United States v. Morrison*, 529 U.S. 598 (2000).

SUMMARY OF ARGUMENT

In its "one-person, one-vote" body of jurisprudence, this Court has repeatedly focused on the need, under the Constitution's Equal Protection Clause, to equalize the relative weight of each *voter*. Total population has in the past been an adequate proxy for the eligible voter population, but the reasoning of this Court's prior cases requires that eligible voter population rather than total population be used when there is a significant divergence between the two, in order that the *votes* of some citizens are not diluted when compared to the votes of others.

---

[1] This brief is filed with the consent of all parties. No counsel for a party in this Court authored this brief in whole or in part, and no person other than *amici* and their counsel made any monetary contribution intended to fund its preparation or submission.

Not only does such a rule reflect the principle on which this Court's one-person, one-vote precedents is based, but it is fully consistent with, indeed compelled by, the idea of sovereignty reflected in both the Declaration of Independence and in the Constitution, both as originally ratified and as subsequently amended.

ARGUMENT

I. This Court's "One-Person, One-Vote" Jurisprudence Has Rightly Focused on *Voters* and *Citizens*.

In *Reynolds v. Sims*, this Court held "that the Equal Protection Clause guarantees the opportunity for equal participation by all *voters* in the election of state legislators," "[s]ince the achieving of fair and effective representation for all *citizens* is concededly the basic aim of legislative apportionment." 377 U.S. 533, 565-66 (1964) (emphasis added). Repeatedly throughout the opinion, the Court focused on the equal rights of *voters* and *citizens*, rather than simply persons. "Undeniably the Constitution of the United States protects the right of *all qualified citizens* to *vote*," it stated. *Id.*, at 554 (emphasis added). It referred to "all qualified voters." *Id.* It spoke of the "right to vote freely" as "the essence of a democratic society. *Id.*, at 555. And it reaffirmed its holding in *Baker v. Carr*, 369 U.S. 186 (1962), that a claim "that the right to vote of certain *citizens* was effectively impaired since debased and diluted" "presented a justiciable controversy." *Id.*, at 556 (emphasis added).

Additionally, relying on its prior decision in *Gray v. Sanders*, the *Reynolds* Court referenced the constitutional command that, when exercising "the voting power," "all who participate in the election are to have

an equal vote. . . ." *Reynolds*, 377 U.S., at 557-58 (quoting *Gray v. Sanders*, 372 U.S. 368, 379 (1963). It repeated the passage from *Gray* noting that the "concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications," again focusing on voters. And it reaffirmed that the "idea that *every voter* is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of [this Court's] decisions." *Id.*, at 557-58.

Similarly, relying on its prior decision in *Wesberry v. Sanders*, the *Reynolds* Court stated that "the Federal Constitution intends that when *qualified voters* elect members of Congress *each vote be given as much weight as any other vote* . . . ." *Id.*, at 559 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964)). "[T]he constitutional prescription for election of members of the House of Representatives 'by the People,'" it added, "'means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.'" *Id.*, at 559. And it drew the conclusion from *Gray* and *Wesberry* that "one person's vote must be counted equally with those of all other *voters* in a State." *Id.*, at 560 (emphasis added).

This emphasis on "voters" and "citizens" has been reiterated time and again in subsequent decisions by this Court. For example, when "calculating the deviation among districts," this Court noted in *Board of Estimate v. Morris*, "the relevant inquiry is whether 'the *vote of any citizen* is approximately equal in weight to that of any other citizen.'" 489 U.S. 688, 701 (1989) (emphasis added, quoting *Reynolds*, 377 U.S., at 579). "The object of districting is to establish 'fair

and effective representation for all *citizens*.'" *Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004) (quoting *Reynolds*, 377 U.S., at 565-68). "[W]hen members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that *equal numbers of voters* can vote for proportionally equal numbers of officials." *Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970) (emphasis added). "[I]n voting for their legislators, all *citizens* have an equal interest in representative democracy, and . . . the concept of equal protection therefore requires that their votes be given equal weight." *Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 (1977). *See also Bush v. Gore*, 531 U.S. 98, 105 (2000) ("It must be remembered that 'the right of suffrage can be denied by a debasement or *dilution of the weight of a citizen's vote* just as effectively as by wholly prohibiting the free exercise of the franchise'") (emphasis added, quoting *Reynolds*, 377 U.S., at 555). In sum, this Court has repeatedly recognized that the protection afforded by the one-person, one-vote principle is for "groups constitutionally entitled to participate in the electoral process." *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

To be sure, elsewhere in the *Reynolds* opinion, this Court spoke of "equal numbers of people." *Reynolds*, 377 U.S., at 561. "Legislators represent people, not trees or acres," it famously said. *Id.*, at 562. It described the constitutional mandate as "one of substantial equality of population," noting that districts should be "apportioned substantially on a population basis" and that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as

is practicable." *Id.*, at 559, 577.

But with these references, the Court was treating "people" synonymously with "citizens," "voters," and "constituents." *See id.*, at 577 ("We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or *citizens*, or *voters*") (emphasis added); *id.*, at 562-63 ("the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of *constituents* is identical" to a scheme which gives some voters more votes than others); *see also Burns*, 384 U.S., at 91 ("At several points [in *Reynolds*], we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population"). This was undoubtedly due to the fact that, at the time, there was not a significant variation across districts between total population, citizen population, and voter population. *See, e.g.*, *WMCA, Inc. v. Lomenzo*, 238 F. Supp. 916, 925 (S.D.N.Y. 1965) (noting that "a change from the citizen base to a resident base for legislative apportionment would have but little impact on the densely populated areas of New York State"), *aff'd*, 382 U.S. 4 (1965); *cf. Garza v. County of Los Angeles*, 918 F.2d 763, 781 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) ("Absent significant demographic variations in the proportion of voting age citizens to total population, apportionment by population will assure equality of voting strength and vice versa").

More fundamentally, this Court in *Reynolds* described "equality of population" as a means to the end of equal voting power of citizens, not an end in and of

itself. "[T]he overriding objective must be substantial equality of population among the various districts," the Court held, "*so that* the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.*, at 579 (emphasis added); *see also Gaffney v. Cummings*, 412 U.S. 735, 744 (1973); *Mahan v. Howell*, 410 U.S. 315, 322 (1973); *Burns*, 384 U.S., at 91 n. 20; *Connor v. Finch*, 431 U.S. 407, 416 (1977). It described "population" as "*the starting point* . . . in legislative apportionment controversies." *Reynolds*, 377 U.S., at 568 (emphasis added). Although it also said that "population" was "the controlling criterion," it immediately thereafter referred again to "[a] citizen, a qualified voter,"[2] *id.*, and subsequently noted that its "discussion [in *Reynolds*] carefully left open the question what population was being referred to," *Burns*, 384 U.S., at 91. Moreover, the *Reynolds* Court explicitly held that "The Equal Protection Clause demands no less than substantially equal state legislative representation for *all citizens*."

---

[2] It is conceivable that an unequal distribution of "citizens" as compared to "qualified voters" in a redistricting plan could also lead to a vote dilution claim. There could be a significant disparity in the number of children across districts, for example, or the number of voting-ineligible felons. Whether the population of "citizens" or "eligible voters" in such a circumstance should serve as the denominator in the one-person, one-vote calculus is therefore an interesting question. It might even be a non-justiciable political question, since there are perfectly valid arguments from a representation-of-the-body-politic perspective in favor of each rule. In either event, those issues are not presented by this case, which deals only with a significant disparity in the distribution across districts of those who are not citizens (including those who are not lawfully present in the United States at all) and therefore not part of the body politic whichever population base—"citizens" or "eligible voters"—is the appropriate metric.

Reynolds, 377 U.S., at 568. "Weighting the votes of *citizens* differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable," the Court added. *Id.*, at 563.

Indeed, the *Reynolds* Court found it hard to imagine that the Founders would have countenanced a districting system that afforded differential weight to the votes of some citizens at the expense of others:

> We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . . .

Id., at 563-64 (quoting *Wesberry*, 376 U.S., at 8). And lest there be any confusion that by the word "inhabitants" the Court meant anything other than "citizens," it included a quotation from James Wilson's Lectures on the Constitution, in which Wilson described what was required for an election to be "equal":

> (A)ll elections ought to be equal. Elections are equal, when a given number of *citizens*, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.

Reynolds, 377 U.S., at 564 n.41 (quoting *Wesberry*,

376 U.S., at 17, in turn quoting 2 The Works of James Wilson 15 (Andrews ed. 1896)).

In sum, by repeatedly focusing on "citizens" and "voters" as the object of the one-person, one-vote principle this Court has derived from the Equal Protection Clause, *Reynolds* and its progeny requires that districts be fashioned based on an equal number of citizen-voters, not a broader understanding of "population" that includes non-citizens, particularly non-citizens who are not lawfully present in the United States. That is why, in *Burns*—the only case in which this Court was presented with factual circumstances where the distribution of total population and voting population differed significantly from one district to the next—this Court upheld a districting plan with wide divergence in total population across districts, because the districts were approximately equal in the number of registered voters (which, in that case, was a close proxy for the eligible voter/citizen population). As Judge Kozinski has correctly noted, although "*Burns* does not, by its terms, purport to *require* that apportionments equalize the number of qualified electors in each district, the logic of the case strongly suggests that this must be so." *Garza*, 918 F.2d, at 784 (Kozinski, J., concurring and dissenting in part).

II. The Political Theory of the Founding, Embodied in Both the Declaration of Independence and the Constitution, Fully Supports Voter-Based Reapportionment.

A. The Declaration of Independence established a "People," and it is that People

whose consent is necessary for the legitimacy of the government they established.

At the very outset of the Declaration of Independence, our Founders announced to the world that "one people"—the American people—were "dissolv[ing] the political bands" that had previously "connected them with another" people and "assum[ing] among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them." Decl. of Ind. ¶ 1. They then articulated a set of principles that, though universal in their reach, provided the rationale for that particular "one people" legitimately to declare independence and to institute a new Government that they believed would be more conducive to their safety and happiness. The key to their philosophic claim was the self-evident truth of human equality, and the corollary truth which flows from it, namely, that governments derive "their just powers from the consent of the governed." *Id.*, ¶ 2.

Combining those two basic ideas—that earthly governments are not universal in their reach but rather are created by particular subsets of people, and that in order to be legitimate, they must be based on the consent of those they would govern—it becomes evident that the one-person, one-vote principle articulated by this Court in *Reynolds* must necessarily be tied to "the people" who form the body politic, not some undifferentiated total population that includes those who are not part of the body politic. Citizens, or those who are eligible to be voters, are "the people" who give the government legitimacy by their consent. They are the people who are the ultimate sovereign in *this* county, who are represented in *our* Congress, and

whose votes should not be diluted when compared to other citizen-voters who happen to live in districts with a significantly larger number of non-citizens living (whether temporarily or illegally) in their midst.

In other words, once this Court recognized that the Equal Protection Clause of the Fourteenth Amendment requires close parity in the apportionment of legislative districts, the principles of the Declaration require that the parity be based on citizen-voters. The interpretation of *Reynolds* and its progeny that Plaintiffs have urged, and that we urge in Part I above, is the only reading that is consistent with those principles.

B. The Constitution's preamble and "Indians Not Taxed" clause also support a Citizen/Voter-based interpretation of the one-person, one-vote rule.

Critical language in the Constitution further demonstrates that the one-person, one-vote rule should be based on voting-eligible population, not a total population that includes non-citizens. The preamble begins with "We the People of the United States," for example, not the people of the world, or any foreign nationals who happen to be in the United States when a census is taken. U.S. Const., Preamble.

The representation clause of Article I embodies the same citizenship-based understanding of "the people." Even as modified by the Fourteenth Amendment to remove the three-fifths compromise with the institution of slavery that existed at the time the Constitution was adopted, representation is based not on "all persons," but on "the whole number of persons in each

State, *excluding Indians not taxed*." U.S. Const. Amend. XIV, § 2 (emphasis added); *see also* U.S. Const. Art. I, § 2, cl. 3 (apportioning "Representatives and direct Taxes" "among the several States" based on "their respective Numbers . . . by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, *and excluding Indians not taxed*, three fifths of all other Persons") (emphasis added). Thomas Jefferson used similar language in his proposal for Articles of Confederation, in the clause apportioning "All charges of war & all other expenses that shall be incurred for the common defense and general welfare," to the "several colonies in proportion to the number of inhabitants of every age, sex & quality, except Indians not paying taxes." Thomas Jefferson, Autobiography (1821), in Paul Leicester Ford, ed., THE WORKS OF THOMAS JEFFERSON, Vol. I:43-57 (1904), *reprinted in* Philip B. Kurland & Ralph Lerner, THE FOUNDERS' CONSTITUTION, Vol. 2, p. 87 (1987).

"Indians not taxed" were excluded from the apportionment of representation (and of taxes) because they were not part of the body politic of the United States, instead owing their allegiance to their particular tribal governments. As this Court noted in *Elk v. Wilkins*, "Indians not taxed are . . . excluded from the count, for the reason that they are not citizens." 112 U.S. 94, 102 (1884); *see also Cherokee Nation v. State of Ga.*, 30 U.S. 1, 42-43 (1831) ("If the clause excluding Indians not taxed had not been inserted, or should be stricken out, the whole free Indian population of all the states would be included in the federal numbers"). By contrast, Indians who "were taxed to support the government"—that is, were part of the

body politic—"should be counted for representation." *United States v. Kagama*, 118 U.S. 375, 378 (1886).

What this demonstrates is that representation in the national government was not apportioned among the states based on total population, but only on that part of the population which comprises or becomes part of the body politic. *Cf. Foley v. Connelie*, 435 U.S. 291, 295 (1978) ("A new citizen has become a member of a Nation, part of a people distinct from others" (citing *Worcester v. Georgia*, 6 Pet. (31 U.S.) 515, 559 (1832)). Today, temporary sojourners, particularly those who are not lawfully present in the United States at all, stand in the same position with respect to representation in government as those "Indians not taxed" did at the time of the Founding. They owe allegiance to another sovereign, and are therefore no part of *this* body politic, no part of the "groups constitutionally entitled to participate in the electoral process" here. *Burns*, 384 U.S., at 92. To count them in the apportionment process, at least when they are unevenly distributed across districts, is necessarily to dilute the votes of some portion of the body politic—of the citizenry—at the expense of another portion. That would violate the *principle* of *Reynolds*, the same principle to which the Founders gave effect by including in their reapportionment calculus only members of the body politic.

III. The Civil War Amendments Themselves Give Heightened Protection to "Citizens," Recognizing the Importance of Membership in the Body Politic For the Exercise of Political Rights.

The one-person, one-vote rule of *Reynolds* is based

on the Fourteenth Amendment, of course, but that Amendment (as well as the Fifteenth) itself recognizes a distinction between "citizens" and "persons." "No State shall make or enforce any law which shall abridge the privileges or immunities *of citizens* of the United States," but a State may not "deprive any *person* of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1.

The same distinction exists in the citizenship clause, albeit more subtly. "All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside." *Id.* (emphasis added). As described by Senator Lyman Trumbull, a key figure in the drafting and adoption of the Fourteenth Amendment, "subject to the jurisdiction" meant subject to the "complete" jurisdiction of the United States, "[n]ot owing allegiance to anybody else." CONG. GLOBE, 39th Cong., 1st Sess. 2893 (1866). And Senator Jacob Howard, who introduced the language of the jurisdiction clause on the floor of the Senate, contended that it should be construed to mean "a full and complete jurisdiction," "the same jurisdiction in extent and quality as applies to every citizen of the United States now." *Id.*, at 2895. The rule in place when he made that statement was the 1866 Civil Rights Act, which provided that "all persons born in the United States *and not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States." Civil Rights Act of 1866 § 1, ch. 31, 14 Stat. 27 (emphasis added).

To be sure, the Equal Protection Clause on which the *Reynolds* holding is based applies to "persons," not

just citizens, but the heightened scrutiny this Court uses when reviewing Equal Protection challenges to classifications based on alienage does not apply when those classifications involve the political rights of citizens. *See, e.g., Foley*, 435 U.S., at 295-96 ("we have recognized 'a State's historical power to exclude aliens from participation in its democratic political institutions,' as part of the sovereign's obligation 'to preserve the basic conception of a political community'" (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647-48 (1973)). As this Court explained in *Sugarman*, the more lenient Equal Protection review of alienage classifications in the political context "is no more than a recognition of a State's historical power to exclude aliens from participation in its democratic political institutions." *Sugarman*, 413 U.S., at 648 (citing *Pope v. Williams*, 193 U.S. 621, 632-34 (1904); *Boyd v. Thayer*, 143 U.S. 135, 161 (1892)). Indeed, this Court has even said "[i]t would be inappropriate . . . to require every statutory exclusion of aliens to clear the high hurdle of 'strict scrutiny,' because to do so would 'obliterate all the distinctions between citizens and aliens, and thus depreciate the historic values of citizenship.'" *Foley*, 435 U.S., at 295-96 (quoting *Nyquist v. Mauclet*, 432 U.S. 1, 14 (1977) (Burger, C. J., dissenting)).

Accordingly, in *Foley*, this Court upheld against an Equal Protection challenge a state law making citizenship a qualification for police officers, 435 U.S., at 300. The year before, it had upheld a state law excluding aliens from jury service. *Perkins v. Smith*, 370 F.Supp. 134 (Md.1974), *aff'd*, 426 U.S. 913 (1976). And the following year it upheld a state law making citizenship a qualification for public school teachers.

Ambach v. Norwich, 441 U.S. 68 (1979). In fact, this Court reviews most state classifications based on alienage under heightened scrutiny precisely because "aliens—pending their eligibility for citizenship—have no direct voice in the political processes." *Foley*, 435 U.S., at 294 (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938)). And it has specifically "recognize[d] a State's interest in establishing its own form of government, and in limiting participation in that government to those who are within 'the basic conception of a political community.'" *Sugarman*, 413 U.S., at 642 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972)); *see also Sugarman*, 413 U.S., at 648 n.13 (acknowledging the "clear evidence" from the "congressional debates leading to the adoption of the Fourteenth Amendment" "that Congress not only knew that as a matter of local practice aliens had not been granted the right to vote, but that under the amendment they did not receive a constitutional right of suffrage or a constitutional right to participate in the political process of state government") (citing Cong. Globe, 39th Cong., 1st Sess., 141-42, 2766-67 (1866)).

Section 1 of the Fifteenth Amendment likewise recognizes the preferred position of "citizens" in the political process: "The right of *citizens* of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. Amend. XV. The same is true of the Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments, which provide that the "right of *citizens*" to vote shall not be denied or abridged on account of sex, failure to pay a poll tax, or age for those above 18, respectively.

U.S. Const. Amends. XIX, XXIV, XXVI.

Section 2 of the Fourteenth Amendment is particularly germane. That section first modifies the representation clause of Article I, Section 3 to eliminate the references to slavery, but it retains the language apportioning representation among the States according to the numbers of "persons in each State, excluding Indians not taxed." U.S. Const. Amend. XIV, § 2. Immediately following that sentence, and textually tied to it, the second sentence provides: "But when the right to vote [for federal or state representatives and other officers] is denied" to any citizens of voting age (male citizens at the time, but including female citizens since passage of the Nineteenth Amendment) "*or in any way abridged*, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such . . . citizens shall bear to the whole number of . . . citizens [of voting age] in such State."

It would be anomalous indeed if the reapportionment process itself were to be the cause of "citizens" having their right to vote "abridged." The only way to avoid that anomaly under the *Reynolds* one-person, one vote regime is to require that districts be apportioned by reference to citizens/voters, not total population, at least where, as here, there is significant divergence between the two. Quite simply, because "the right to govern is reserved to citizens," *Foley*, 435 U.S., at 297, the right to an equal, undiluted vote to decide who will govern must likewise be "reserved to citizens."

CONCLUSION

The district court's judgment denying relief on Plaintiffs' claim that the significant vote dilution that occurs when non-citizens are included in the reapportionment process and unevenly distributed across districts is unconstitutional should be reversed.

Respectfully submitted,

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
CENTER FOR CONSTITUTIONAL JURISPRUDENCE
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
jeastman@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

August 2015

No. 14-940

IN THE

Supreme Court of the United States

Supreme Court, U.S.
FILED
SEP 25 2015
OFFICE OF THE CLERK

SUE EVENWEL, *et al.*

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF THE CHILDREN'S DEFENSE FUND, THE FAIR ELECTIONS LEGAL NETWORK, AND THE UNION FOR REFORM JUDAISM & CENTRAL CONFERENCE OF AMERICAN RABBIS, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

ROBERT BRANDON
JON SHERMAN
ARCHITA TAYLOR
FAIR ELECTIONS LEGAL NETWORK
1825 K Street NW
Suite 450
Washington DC 20006
(202) 331-1550

CORY D. SZCZEPANIK
SIDLEY AUSTIN LLP
2001 Ross Avenue
Suite 3600
Dallas, TX 75201
(214) 981-3300

DAVID R. CARPENTER*
JOSE SANCHEZ
SIDLEY AUSTIN LLP
555 West Fifth Street
#4000
Los Angeles, CA 90013
drcarpenter@sidley.com

CAMERON F. KERRY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

September 25, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Library of Congress
Law Library

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. TOTAL POPULATION IS A NECESSARY METRIC BECAUSE CHILD POPULATIONS ARE SUBSTANTIAL AND UNEVENLY DISTRIBUTED IN TEXAS AND ELSEWHERE IN THE UNITED STATES	6
II. USING TOTAL POPULATION IS NECESSARY TO PROTECT CHILDREN'S INTERESTS AND RIGHTS	13
A. Apportionment By Citizen Voting Age Population Would Undermine Children's Representation And Policy Interests	13
B. Using CVAP Ignores The Substantial Number Of Underage Citizens Who Will "Age Into" The Voting Population	20
CONCLUSION	23
APPENDICES	
APPENDIX 1: Child Population Data By County (Texas)	App1
APPENDIX 2: Child Population by State Senate District	App10

TABLE OF AUTHORITIES

CASES Page

Brown v. Bd. of Educ., 347 U.S. 483 (1954), *supplemented*, 349 U.S. 294 (1955) 14
Burns v. Richardson, 384 U.S. 73 (1966) 5, 9
Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000) 5, 9, 13
Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996) 5
Garza v. Cnty. of L.A., 918 F.2d 763 (9th Cir. 1990) 5, 13
McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), *overrulled on other grounds by Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010) 13
Reynolds v. Sims, 377 U.S. 533 (1964) 4

CONSTITUTION

U.S. Const. amend. XIV, § 2 5

OTHER AUTHORITIES

Annie E. Casey Found., *The Changing Child Population of the United States: Analysis of Data from the 2010 Census* (Nov. 2011), *available at* http://www.aecf.org/m/resourcedoc/AECF-ChangingChildPopulation-2011-Full.pdf 6, 7
Annie E. Casey Found., Kids Count Data Ctr., *Child Population by Nativity*, http://datacenter.kidscount.org/data/tables/116-child-population-by-nativity?loc=1&loct=2#detailed/2/2-52/true/36,868,867,133,38/76,77/447,448 (last visited Sept. 22, 2015) 7, 8

TABLE OF AUTHORITIES – continued

Page

Annie E. Casey Found., Kids Count Data Ctr., *Florida Indicators*, http://datacenter.kidscount.org/data#FL/5/0 (last visited Sept. 22, 2015) 11, 12

Annie E. Casey Found., Kids Count Data Ctr., *Kids Count National Indicators*, http://datacenter.kidscount.org/data#USA/1/0 (last visited Sept. 23, 2015) 17

Annie E. Casey Found., Kids Count Data Ctr., *Texas Indicators*, http://datacenter.kidscount.org/data#TX/3/0 (last visited Sept. 22, 2015) 6, 8, 18, 19

Annie E. Casey Found., Kids Count Data Ctr., *Total Population by Child and Adult Populations*, http://datacenter.kidscount.org/data/Tables/99-total-population-by-child-and-adult-populations?loc=1&loct=2#detailed/2/2-52/true/869/39,40,41/417 (last visited Sept. 22, 2015) 6

Anne E. Casey Found., *2015 Data Book: State Trends in Child Well-Being* (2015), *available at* http://www.aecf.org/m/resourcedoc/aecf-2015kidscountdatabook-2015.pdf 18

W. Steven Barnett, *Long-Term Effects of Early Childhood Programs on Cognitive and School Outcomes*, 5 The Future of Children 25 (1995), *available at* http://www.princeton.edu/futureofchildren/publications/docs/05_03_01.pdf 15

TABLE OF AUTHORITIES – continued

Page

Matt Broaddus, Ctr. on Budget & Policy Priorities, *Medicaid-Eligible Children Grow Up to Earn More and Pay More in Texas* (Jan. 21, 2015), http://www.cbpp.org/blog/medicaid-eligible-children-grow-up-to-earn-more-and-pay-more-in-taxes... 15

Ronald Brownstein, *More Kids, More Problems*, The Atlantic, Aug. 9, 2015, *available at* http://www.theatlantic.com/education/archive/2015/08/youth-population-growth-p or-outcomes/400751/ 7, 17, 18

Eva DeLuna Castro, Ctr. for Pub. Policy Priorities, *The 2014-2015 Texas Children's Budget Doesn't Meet Our Needs*, Oct. 2013, *available at* http://www.forabettertexas.org/images/2013_10_PP_ChildrensBudget1415.pdf..... 16

Ctr. for Pub. Policy Priorities, *Invest in Texas Kids. It Matters* (2013), http://www.forabettertexas.org/images/2013_RE_CW_Invest_in_Me.pdf..... 15

Child & Family Policy Ctr., *Early Child hood Needs Assessment*, (Aug. 31, 2012), *available at* http://www.cfpciowa.org/en/data/early_childhood_needs_assessment/. 11

Flavio Cunha et al., *Interpreting the Evidence on Life Cycle Skill Formation*, *in* 1 *Handbook of the Economics of Education* 697 (Hanushek & Welch eds., 2006), *available at* http://jenni.uchicago.edu/papers/Cunha_Heckman_etal_2006_HEE_v1_ch12.pdf..... 15

TABLE OF AUTHORITIES – continued

Page

Frances Deviney & Pace Phillips, *Texas' Child Population: More Kids, More Diversity, More Responsibility* (May 2011), *available at* http://library.cppp.org/files/10/TexasChildPopulation_paper.pdf 6, 7, 9, 12

Kaiser Family Found., *Population Distribution by Citizenship*, http://kff.org/other/state-indicator/distribution-by-citizenship-status/ (last visited Sept. 22, 2015) 8

Lynn A. Karoly et al., *Proven Benefits of Early Childhood Interventions, RAND Research Brief* (2005), http://www.rand.org/pubs/research_briefs/RB9145.html 15

Lucille Packard Found. for Children's Health, *California's Declining Child Population: At the County Level, a Complex Shift* (Oct. 7, 2013), http://www.lpfch.org/cshcn/blog/2013/10/07/california%E2%80%99s-declining-child-population-county-level-complex-shift 11

Lucille Packard Found. for Children's Health, kidsdata.org, *California Child Population*, http://www.kidsdata.org/region (last visited Sept. 22, 2015) 11

William O'Hare et al., Found. for Child Dev., *Analyzing State Differences in Child Well-Being* (Jan. 2012), *available at* http://fcd-us.org/sites/default/files/Analyzing%20State%20Differences%20in%20Child%20Well-Being_0.pdf 14, 15

TABLE OF AUTHORITIES – continued

Page

Nat'l Educ. Assoc., *Early Childhood Education*, http://www.nea.org/home/18163.htm (last visited Sept. 22, 2015)..... 15

Arloc Sherman et al., Ctr. on Budget & Policy Priorities, *Various Supports for Low-Income Families Reduce Poverty and Have Long-Term Positive Effects On Families and Children* (July 30, 2013), http://www.cbpp.org/research/various-supports-for-low-income-families-reduce-poverty-and-have-long-term-positive-effects..... 15

Tex. Legislative Council, *Texas Redistricting*, http://www.tlc.state.tx.us/redist/districts/senate.html (last visited Sept. 22, 2015)..... 11

Christopher Uggen et al., Sentencing Project, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010* (July 2012), *available at* http://felonvoting.procon.org/sourcefiles/2010_State_Level_Estimates_of_Felon_Disenfranchisement.pdf..... 8

U.S. Census, *American Community Survey One-Year Estimate: 2014*, *available at* http://factfinder.census.gov (last visited Sept. 22, 2015)..... 12

U.S. Census, *American Factfinder B05003*, *available at* http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003&prodType=table (last visited Sept. 22, 2015)..... 7

TABLE OF AUTHORITIES – continued

Page

Voices for Utah Children, *Measures of Child Well-Being in Utah* (2015), *available at* http://www.utahchildren.org/images/pdfs/2015/2015_Utah_KIDS_COUNT_Data_book_5-7-15.pdf 11, 12

INTEREST OF *AMICI CURIAE*[1]

The Children's Defense Fund ("CDF") is a national leader for the rights of children who cannot vote, lobby, or speak for themselves. CDF's Leave No Child Behind® Mission is to ensure every child a *Healthy Start*, a *Head Start*, a *Fair Start*, a *Safe Start* and a *Moral Start* in life and successful passage to adulthood with the help of caring families and communities. The organization pays particular attention to the needs of poor children, children of color, and those with disabilities. CDF educates the Nation about the needs of children and encourages preventive investments before children get sick, drop out of school, get into trouble, or suffer family breakdown.

The Children's Defense Fund-Texas is a branch of CDF committed to raising awareness specifically about the needs of Texas children, connecting children and families to resources, and working with partners statewide to coordinate broad support for legislative action on behalf of the children of Texas. CDF-California, CDF-Minnesota, CDF-New York, and CDF-Ohio also join in this brief because of this case's nationwide implications. CDF's branch offices are in states that account for 34.2 % of the country's children, 36.7 % of all poor children, 46.4 % of the total number of children of color, 48.6 % of children of color in poverty, and 36.2% of the country's uninsured

---

[1] The parties have consented to the filing of this brief through their omnibus consents filed with this Court on June 9 and 10, 2015. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

children. CDF and its state branches are thus especially interested in ensuring that children have equal representation in state and local governments as policies affecting them are being developed.

The Fair Elections Legal Network (FELN) is a national, nonpartisan voting rights and legal support organization focused on removing barriers to registration and voting for traditionally under-represented constituencies. FELN works to improve election administration and access to voting through administrative, legal, and legislative reform, as well as through legal and technical assistance to voter mobilization organizations. FELN strives to make the processes of voter registration, voting, and election administration as accessible as possible for every American. FELN specifically focuses on how these processes impact students, youth, and minority voters. As it relates to young people, FELN seeks to expand the franchise and improve election processes through the implementation of policies like preregistration of 16- and 17-year olds, registration of 18-year olds through high schools, and encouraging the use of on-campus polling locations at colleges and universities.

The Union for Reform Judaism (URJ) consists of 900 member congregations across North America, including 1.5 million Reform Jews. The Central Conference of American Rabbis (CCAR) is an organization of more than 2000 rabbis serving the Reform Jewish Movement. As part of their religious commitment to social justice, the URJ and CCAR have been involved in advocacy before courts and legislatures on numerous issues, and come to this issue rooted in our firm and longstanding commitment to the principle of voting representation that is so central to the functioning of a healthy

democracy. The URJ and CCAR have appeared before this Court, for example, on issues relating to the electoral process, and will be affected by the outcome of this case insofar as they frequently advocate in state legislatures on behalf of those who are most vulnerable, who include children and families.

Proyecto Azteca, which is a member Equal Voice Network-Rio Grande Valley, and Texans Care for Children also join as signatories to this brief as Texas-based organizations dedicated to engaging in advocacy and providing support for children and low-income families.

Amici submit this brief in support of Appellees urging affirmance of the decision below upholding the constitutionality of a Texas Senate apportionment plan ("the Plan"). By creating state senate districts with approximately equal total populations, the Plan ensures equal representation in the legislature for people in areas with high concentrations of children, so that state services and resources – particularly with respect to education – are allocated fairly and appropriately to those who need them most.

As advocates on behalf of the rights of children and families and of underage citizens, *Amici* have a strong interest in confirming that representational equality of the total population, including children, is a constitutionally valid objective. *Amici* support a rule that equalizing representation based on total population should be required (recognizing that, in certain cases, other metrics may be used as reasonable proxies or supporting factors). At a minimum, however, States should have the discretion to use total population rather than citizen voting age population as the relevant and controlling metric in their apportionment plans.

SUMMARY OF ARGUMENT

Children are not able to vote, but they have a vital stake in the affairs of our Nation, just as the Nation has a vital stake in its children. In our representative democracy, "[l]egislators represent people." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Throughout our nation's history and several constitutional amendments, the voting franchise has been extended to include non-freeholders, slaves, and male citizens of all races and color (through the Thirteenth and Fifteenth Amendments), women (Nineteenth Amendment), and those eighteen years of age and older (Twenty-Sixth Amendment). Children under the age of 18 are 23% of the total U.S. population – and an even greater share of the population in Texas – and are now the largest segment of people not included in the voting population.

The problem with ignoring such a substantial share of the population in an apportionment plan is that in many states and other political sub-divisions – including Texas – the child population is concentrated in certain areas. Requiring jurisdictions to equalize citizen voting age population ("CVAP") would result in some legislators serving substantially overpopulated districts, and would undermine the representational interests of children and people in areas with higher underage populations. By diluting their political power in favor of those in less populated areas, children and families will have less access to critical resources, including quality education, health care, and services supporting children living at or below the poverty line. Relying on CVAP in such contexts also would create inequality even among *voters*, as significant numbers of citizens who are underage at the time of

apportionment will "age into" the eligible voter population while the plan is in effect.

Amici therefore agree with the arguments being made by the State of Texas and other *amici* in support of the Plan. This Court has allowed states latitude to include or exclude different categories of nonvoters "in the apportionment base," so long as their choice is not "one the Constitution forbids," *Burns v. Richardson*, 384 U.S. 73, 92 (1966). Plainly, the Constitution does not forbid apportioning legislators on the basis of total population, as this is the measure used in the Constitution itself. See U.S. Const. amend. XIV, § 2. Apportioning legislators based on total population – rather than citizens or voters – is consistent with prevailing practice, with how the Census is conducted, and most critically, with the fundamental principle of representational equality. See *Chen v. City of Houston*, 206 F.3d 502, 522-28 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212, 1222-28 (4th Cir. 1996); *Garza v. Cnty. of L.A.*, 918 F.2d 763, 774-75 (9th Cir. 1990).

Amici write additionally to explain the demographics of child populations in Texas and elsewhere, and to highlight the impact of eliminating such a large and significant group from the apportionment base merely because they are underage at the time of redistricting. This case is not about electoral equality in the sense of freedom from discrimination in access to the voting booth or the power to elect one's candidate of choice. This case is about the ability to have a legislature that represents all the people equally, and about the foreseeable and inevitable negative effects of declaring that children "don't count." The State of Texas, for good reason, has chosen to define the "people" entitled to equal representation to include children, among other

nonvoters. This Court, at a minimum, should uphold its power to do so.

ARGUMENT

I. TOTAL POPULATION IS A NECESSARY METRIC BECAUSE CHILD POPULATIONS ARE SUBSTANTIAL AND UNEVENLY DISTRIBUTED IN TEXAS AND ELSEWHERE IN THE UNITED STATES.

1. Across the United States, there are approximately 75 million children, making up 23% of the total population.[2] Texas has nearly 7 million residents under age 18 – 26% of its state population.[3] This is the second highest percentage in the U.S., tied with Idaho; only Utah has a higher percentage of children, at 31%.[4]

In the decade between the 2000 Census and the 2010 Census, the total U.S. child population grew by 1.8 million or 3.9%,[5] but that growth was much more

---

[2] Annie E. Casey Found., *The Changing Child Population of the United States: Analysis of Data from the 2010 Census* 1 (Nov. 2011), *available at* http://www.aecf.org/m/resourcedoc/AECF-ChangingChildPopulation-2011-Full.pdf.

[3] *See* Annie E. Casey Found., Kids Count Data Ctr., *Total Population by Child and Adult Populations*, http://datacenter.kidscount.org/data/Tables/99-total-population-by-child-and-adult-populations?loc=1&loct=2#detailed/2/2-52/true/869/39,40,41/417 (last visited Sept. 23, 2015); *see generally* Annie E. Casey Found., Kids Count Data Ctr., *Texas Indicators*, http://datacenter.kidscount.org/data#TX/3/0 (last visited Sept. 23, 2015) (statistical indicators of the well-being of Texan children).

[4] *Id.*

[5] Frances Deviney & Pace Phillips, *Texas' Child Population: More Kids, More Diversity, More Responsibility* 1 (May 2011), *available at* http://library.cppp.org/files/10/TexasChildPopulation_paper.pdf.

rapid in some states than others.[6] In Texas during that period, the child population increased by 16%, growing from 5.9 million to 6.9 million and accounting for more than half of the entire U.S. child population growth. Deviney, *supra* note 5, at 1. Other states experiencing substantial child population growth since 2000 include Nevada, Utah, Arizona, Idaho, North Carolina, Georgia, Colorado, and Florida.[7]

The vast majority of children in the United States are, of course, citizens.[8] In Texas, for example, 96% of children are native born citizens,[9] and the numbers

---

[6] *See id.*; Ronald Brownstein, *More Kids, More Problems*, The Atlantic, Aug. 9, 2015, *available at* http://www.theatlantic.com/education/archive/2015/08/youth-population-growth-poor-outcomes/400751/.

[7] *See The Changing Child Population*, *supra* note 2, at 1, 9-10.

[8] According to the ACS 2009-2013 5-year historical estimates, 97% of people under age 18 are citizens. U.S. Census, *American Factfinder B05003*, *available at* http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003&prodType=table (last visited Sept. 23, 2015); *see* Annie E. Casey Found., Kids Count Data Ctr., *Child Population by Nativity*, http://datacenter.kidscount.org/data/tables/116-child-population-by-nativity?loc=1&loct=2#detailed/2/2-52/true/36,868,867,133,38/76,77/447,448 (last visited Sept. 23, 2015).

[9] *Child Population by Nativity*, *supra* note 8; *see generally* Deviney, *supra* note 5, at 2 (noting that pace of international migration in Texas is declining; most population growth is from children or domestic migration). Data from Kids Count show that, in Texas' seven largest cities, 93-96% of children are citizens; even among children living in immigrant families, 88-92% are citizens. *Texas Indicators*, *supra* note 3 (index to tables for Child Population by Nativity and Children in Immigrant Families Who Are U.S. Citizens).

are similar for other states with larger populations of immigrants.[10]

These numbers put in context the attempt by Appellants and the *amici* on their behalf to frame this case solely in terms of the rights of citizen voters – often in contrast to "individuals who are not American citizens (and may even be in the country illegally)" or disenfranchised felons.[11] That framing is myopic, at best, because a very large portion of our population includes *underage citizens*, and citizen children are *by far* the largest population of people ineligible to vote – much larger than noncitizens and disenfranchised felons combined.[12] The biggest effect of using CVAP, rather than total population, for the apportionment base is not to the exclusion of noncitizens from consideration, but the exclusion of children.

---

[10] *See Child Population by Nativity*, *supra* note 8. For example, in each of California, Arizona, Colorado, and Nevada, 95-97% of children are native-born.

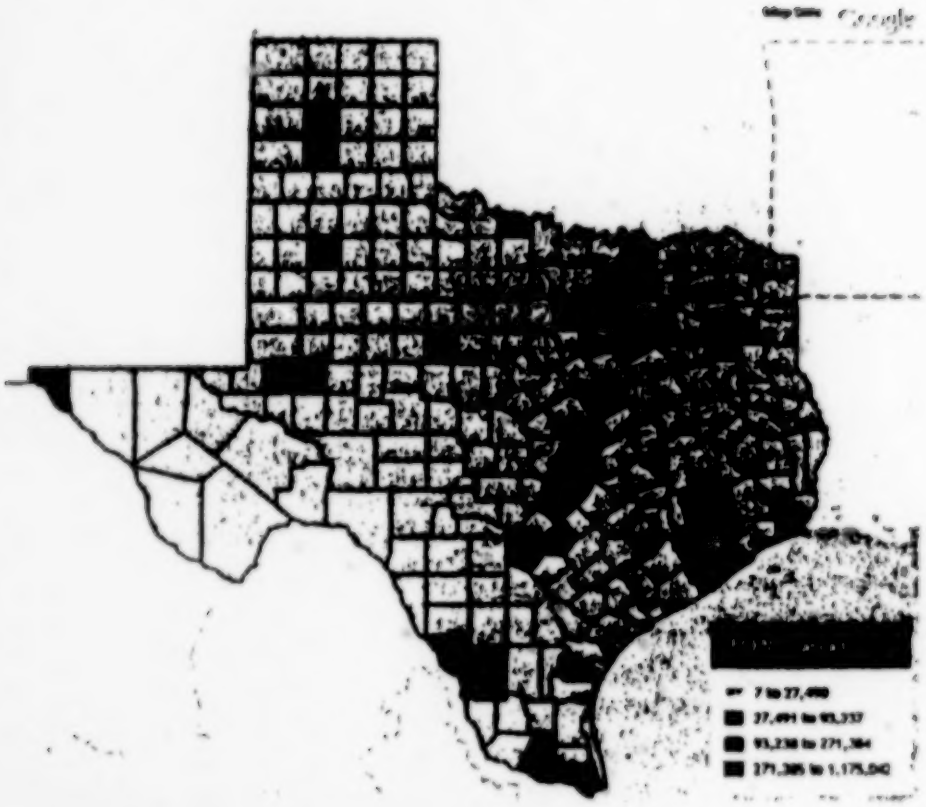
[11] Brief of the American Civil Rights Union as *Amicus Curiae* in Support of Appellants at 2; *see also, e.g.*, Brief *Amicus Curiae* of Eagle Forum Education & Legal Defense Fund, Inc. in Support of Appellants at 2.

[12] As reflected above, approximately 25% of the Texas population comprises underage *citizens*. Noncitizens are only approximately 11% of the total population. Kaiser Family Found., *Population Distribution by Citizenship*, http://kff.org/other/state-indicator/distribution-by-citizenship-status/ (last visited Sept. 23, 2015). Disenfranchised felons are around 2.5% of total population (less than 3% of the voting age population). Christopher Uggen et al., Sentencing Project, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010* (July 2012), *available at* http://felonvoting.procon.org/sourcefiles/2010_State_Level_Estimates_of_Felon_Disenfranchisement.pdf.

2. As courts have observed, in many cases different metrics – total population as opposed to CVAP or voters – can be used as proxies for each other, but that is not necessarily true when there is an uneven distribution of demographic populations. See *Chen*, 206 F.3d at 525; see also *Burns*, 384 U.S. at 93-94 (upholding Hawaii's ability to use registered voters "as a reasonable approximation of both citizen and total population"). This is the case with the child population in Texas and elsewhere, and is why one cannot simply assume that using CVAP will provide, by proxy, equal representation of children in state legislatures.

In Texas, for example, the child population growth has been concentrated in just eight urban counties (Bexar, Collin, Denton, Fort Bend, Harris, Hidalgo, Tarrant, and Travis). See Deviney, *supra* note 5, at 1; Appendix 1 hereto. More than half of Texas counties – nearly all of them rural – actually have fewer children now than in 2000. *Id.*

This map illustrates the point:



TOTAL CHILD POPULATION (NUMBER) - 2013

Center for Public Policy Priorities
KIDS COUNT Data Center, datacenter.kidscount.org
A project of the Annie E. Casey Foundation

Child population as a percentage of total county population ranges from 8.5% (Loving County) to 34.9% (Gaines County). See Appendix 1. Fifteen counties have more that 30% of their total population under 18 and they contain more than half a million children (576,028). Harris County – with the largest child population (1,175,042) also has an above average percentage – 27.2%. Similar variations are seen in state senate districts, as the Child population as a percentage of total district population ranges

from 23% in District 14 to 33.1% in District 27.[13] Seven districts have more than 29% of their total population under age 18.

This phenomenon is not unique to Texas; it exists in other states where certain counties or areas have relatively high concentrations of children. For example, in California, the concentration of children by county ranges from 14.4% for San Francisco County, to 23% for Los Angeles County (roughly the state average), to 26.8% or higher for San Bernardino County and many other inland counties.[14] Wide variation in the concentration of children is also seen in, for example, Arizona (Apache County, 29.1%, vs. Yavapai County, 17.4%); Georgia (Liberty County, 29.0% vs. Clarke County, 17.6%); Illinois (Kendall County (28.6%) vs. Champaign County (19.1%), New

---

[13] *See* Appendix 2 hereto, which is based on http://www.tlc.state.tx.us/redist/districts/senate.html (last visited Sept. 23, 2015).

[14] Lucille Packard Found. for Children's Health, kidsdata.org, *California Child Population*, http://www.kidsdata.org/region (last visited Sept. 23, 2015) (California Child Population tables); *see also* Lucille Packard Found. for Children's Health, *California's Declining Child Population: At the County Level, a Complex Shift* (Oct. 7, 2013), http://www.lpfch.org/cshcn/blog/2013/10/07/california%E2%80%99s-declining-child-population-county-level-complex-shift. For variation in child population by county in other states as well, *see, e.g.*, Annie E. Casey Found., Kids Count Data Ctr., *Florida Indicators*, http://datacenter.kidscount.org/data#FL/5/0 (last visited Sept. 23, 2015) (Population under Age 18 link); Voices for Utah Children, *Measures of Child Well-Being in Utah* 8 (2015), *available at* http://www.utahchildren.org/images/pdfs/2015/2015_Utah_KIDS_COUNT_Data_book_5-7-15.pdf; Child & Family Policy Ctr., *Early Childhood Needs Assessment* (Aug. 31, 2012), *available at* http://www.cfpciowa.org/en/data/early_childhood_needs_assessment/ (Part 1: Statewide Population Trends Narrative link) (Iowa).

York (Rockland County, 27.8% vs. New York County, 14.7%), and North Carolina (Union County, 28.6% vs. Brunswick County, 17.3%).[15] These states, too, have very good reason to use total population – rather than CVAP – to ensure that all people receive equal representation in their legislatures.

Plaintiffs have suggested that one could draw lines differently to eliminate vast discrepancies between total population and CVAP for the Texas districts. Whether or not one can draw lines to make the math work, Plaintiffs provide no allegation, much less a plausible one, that the State could equalize CVAP across districts without sacrificing other core redistricting principles. When children are as heavily concentrated in certain counties or urban centers as they are in Texas, one cannot equalize total and CVAP populations without "cracking" districts, ignoring county lines or other natural boundaries, and dividing areas of concentrated child populations into tiny slivers – thereby impairing peoples' ability to elect candidates of their choice.[16]

---

[15] Data is based on the *American Community Survey One-Year Estimate: 2014, available at* http://factfinder.census.gov (last visited Sept. 23, 2015) (using statistics "B01003: Total Population" and "B09001: Population Under 18 Years By Age"). As additional examples, *see, e.g., Florida Indicators, supra* note 14 (Population under Age 18 link); Voices for Utah Children, *supra* note 14, at 8.

[16] In this respect, it bears noting that in Texas, while almost all children are citizens, the growth of child population is occurring faster among children of racial and ethnic minority groups, while the number of white children overall and in many counties has decreased. *See* Deviney, *supra* note 5, at 2.

II. USING TOTAL POPULATION IS NECESSARY TO PROTECT CHILDREN'S INTERESTS AND RIGHTS.

A. Apportionment By Citizen Voting Age Population Would Undermine Children's Representation And Policy Interests.

In *Chen*, the Fifth Circuit observed the negative effects of using CVAP when a state has uneven concentration of demographics. 206 F.3d at 525. People in areas with "a larger population – and thus perhaps a greater need for government services than the other community" – will find their political power does not adequately represent the size of their community. *Id.* Using CVAP would thus run contrary to the principle of "representational equality – that representatives are chosen by a district's voters, but should represent all persons resident therein." *Id.* The Ninth Circuit in *Garza* made a similar observation that using a total population standard – rather than one based on voters – "is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government;" a voter-based measure would result in there being fewer representatives to serve and listen to people in high-population areas. *Garza*, 918 F.2d at 775-76 (quoting *Calderon v. City of L.A.*, 4 Cal. 3d 251, 258-59 (1971)).

This is a particular concern for children's interests, because, although children cannot vote, they are certainly affected by the political process and have a right to participate in it. See *id.* at 775-76 (citing example from *Calderon* that "a 17-year-old, who by state law is prohibited from voting, may still have strong views on the Vietnam War which he wishes to communicate to the elected representative from his area"); cf. *McConnell v. Fed. Election Comm'n*, 540

U.S. 93, 231-32 (2003) (invalidating statute that prohibited minors from contributing to campaigns). Indeed, *Chen*'s observations about the negative consequences of using CVAP over total population are fully applicable here and confirmed by the data.

1. Having equal representation for children in a state legislature is critical because a principal responsibility of a state legislature is to allocate resources for its children – especially with respect to education, access to health care, and services to mitigate the effects of poverty.[17] As this Court has emphasized, education in particular "is perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). It "is required in the performance of our most basic public responsibilities, even service in the armed forces," and it "is the very foundation of good citizenship." *Id.* Education is a "principal instrument" in preparing students "for later professional training," "helping [them] to adjust normally to [their] environment," and in providing a reasonable chance "to succeed in life." *Id.*

Numerous studies have demonstrated that "child well-being is related to state and local tax rates, level of [temporary assistance] benefits, per-pupil

---

[17] While the federal government is substantially responsible for maintaining the welfare of senior citizens – through programs like Social Security and Medicare – much of the responsibility for sustaining the well-being of children falls on the state legislatures. As recent studies indicate, the federal government provides $23,500 in support for each elderly person, but only $3,348 for each child. William O'Hare et al., Found. for Child Dev., *Analyzing State Differences in Child Well-Being* 9 (Jan. 2012), *available at* http://fcd-us.org/sites/default/files/Analyzing%20State%20Differences%20in%20Child%20Well-Being_0.pdf.

expenditures on elementary and secondary education, and access to public medical insurance programs." O'Hare, *supra* note 17, at 3-4.[18] A recent analysis of 20 years of Texas state budget and child well-being data confirms that total per-child spending has been positively related to improvements in children's health, safety, and youth behaviors.[19] The researchers also found evidence of multiplier effects for each budget area, whereby increases in Texas spending in one area were associated with improvements in multiple dimensions of child well-being. The findings of this research provide data-

---

[18] *See generally* Lynn A. Karoly et al., *Proven Benefits of Early Childhood Interventions, RAND Research Brief* (2005), http://www.rand.org/pubs/research_briefs/RB9145.html (last visited Sept. 23, 2015); Matt Broaddus, Ctr. on Budget & Policy Priorities, *Medicaid-Eligible Children Grow Up to Earn More and Pay More in Texas* (Jan. 21, 2015), http://www.cbpp.org/blog/medicaid-eligible-children-grow-up-to-earn-more-and-pay-more-in-taxes (last visited Sept. 23, 2015); Arloc Sherman et al., Ctr. on Budget & Policy Priorities, *Various Supports for Low-Income Families Reduce Poverty and Have Long-Term Positive Effects On Families and Children* (July 30, 2013), http://www.cbpp.org/research/various-supports-for-low-income-families-reduce-poverty-and-have-long-term-positive-effects (last visited Sept. 23, 2015); W. Steven Barnett, *Long-Term Effects of Early Childhood Programs on Cognitive and School Outcomes*, 5 The Future of Children 25 (1995), *available at* http://www.princeton.edu/futureofchildren/publications/docs/05_03_01.pdf; Flavio Cunha et al., *Interpreting the Evidence on Life Cycle Skill Formation*, *in* 1 *Handbook of the Economics of Education* 697 (Hanushek & Welch eds., 2006), *available at* http://jenni.uchicago.edu/papers/Cunha_Heckman_etal_2006_HEE_v1_ch12.pdf; Nat'l Educ. Assoc., *Early Childhood Education*, http://www.nea.org/home/18163.htm (last visited Sept. 23, 2015) (collecting studies).

[19] Ctr. for Pub. Policy Priorities, *Invest in Texas Kids. It Matters* (2013), *available at* http://www.forabettertexas.org/images/2013_RE_CW_Invest_in_Me.pdf .

based evidence to support adequate investments in children and point to the central responsibility of state elected officials to allocate state resources in ways that enable children to fulfill their potential as persons and as citizens.

For the recent 2014-2015 biennium, Texas legislators proposed spending $81 billion on children during that period – a full 40% of all state spending – with the largest categories being education (53%) and health (22%).[20] While the sufficiency of these levels is a matter for democratic debate, the data demonstrate the centrality of that debate to the business of the Texas Legislature and the magnitude of stake that Texas children have in the Legislature's decisions.

As a result, allocating adequate representation to areas with high concentrations of children is critical to ensure that children within those districts receive proportionate and essential levels of resources. The relationship between child well-being, child population, and allocation of state resources shows the need for children's interests to have more – not less – weight in state policy and budget decisions. Requiring use of CVAP as a controlling metric, however, would shift the balance of legislative power in the opposite direction, away from those who live in areas with higher concentrations of children, and toward constituencies and communities that have the least incentive to invest resources in the areas most critical to a state's children and future.

2. The need for equal representation of children is also particularly important because, as *Chen*

---

[20] Eva DeLuna Castro, Ctr. for Pub. Policy Priorities, *The 2014-2015 Texas Children's Budget Doesn't Meet Our Needs*, Oct. 2013, *available at* http://www.forabettertexas.org/images/2013_10_PP_ChildrensBudget1415.pdf.

surmised, it is precisely those areas with higher child populations that have the greatest need. As a recent article in *The Atlantic* highlighted: "the states with the largest-growing youth populations[ ] tend to produce the worst outcomes for kids, judged by such measures as high-school graduation rates, access to health insurance, and exposure to poverty."[21] By way of example, in Georgia, Nevada, and Texas – three of the states where child populations have grown fastest since 2000 – the states generally were below the national average in such measures, including in:

- Per-pupil educational expenditures adjusted for regional cost differences in 2012 (nationally: $11,735, Georgia: $9,394, Nevada: $8,141, Texas: $8,113);
- The percentage of children age 18 and below without health insurance in 2011 (nationally: 10%, Georgia: 12%, Nevada: 19%, Texas: 16%); and
- The percentage of children in poverty in 2014 (nationally: 22%, Georgia: 26%, Nevada: 22%, Texas: 25%).[22]

The Annie E. Casey Foundation ranks states based on factors indicative of child well-being,[23] and as observed in *The Atlantic*,

---

[21] *See* Brownstein, *supra* note 6.

[22] Annie E. Casey Found., Kids Count Data Ctr., *Kids Count National Indicators*, http://datacenter.kidscount.org/data #USA/1/0 (last visited Sept. 23, 2015) (using indicators "Per-Pupil Educational Expenditures Adjusted for Regional Differences," "Children 18 And Below Without Health Insurance," and "Children in Poverty (100 Percent Poverty)").

> Overall, nearly 37 million young people – representing 45 percent of Americans under 20 – now live in the 15 states at the bottom of the Casey Foundation list. Just 15 million youth, representing only 19 percent of that same age cohort, live in the top 15 states. Moving forward, this discrepancy may only widen: Of the 15 states that experienced the largest percentage increases in their youth populations, nine rank in the bottom 15 and just one is in its top 15.

Brownstein, *supra* note 6.

The challenges facing areas of dense child population are illustrated in greater detail by data from Texas. Texas ranks 41st in overall child well-being on the Casey Foundation list. Nearly two million children live in the seven major cities in Texas (Arlington, Austin, Dallas, El Paso, Fort Worth, Houston, San Antonio), making up fully 27% of the total child population of Texas.[24] Five of these cities have child poverty rates higher than 25% (the state average), and in Dallas, nearly 40% of children are living in poverty. These cities are also generally worse off in health indicators, including infant mortality rates and rates of low-birthweight babies.

These disparities also are reflected in Texas senate districts. Using the same Casey Foundation indicators, one can compare the two senate districts with the lowest child population percentage (Districts

---

[23] Anne E. Casey Found., *2015 Data Book: State Trends in Child Well-Being* 41 app. 1 (2015), *available at* http://www.aecf.org/m/resourcedoc/aecf-2015kidscountdatabook-2015.pdf.

[24] *See Texas Indicators*, *supra* note 3.

14 and 17) and the two with the highest percentage (Districts 20 and 27).[25]

% District children population (0-17 yrs.)	23.45%	31.75%
Infant mortality per 1000	2.59	3.94
Children living in areas of poverty*	6.15%	30.60%
Percent children with food insecurity	19.39%	23.91%
Percent attrition in public high schools	19.88%	25.13%
High school dropouts	4.13%	8.84%
Confirmed victims of child abuse per 100,000 children (0-17)	8.06	9.86

This comparison shows that the two districts with higher child concentrations have worse conditions across multiple indicators of child well-being, reflecting greater need for resources – and influence in the legislature – to promote children's education, health care, and relief from the conditions of poverty. Using total population for the apportionment base at least provides people in Districts 20 and 27 with equal representation in the legislature to address these needs through the democratic process.

Using CVAP, however, would push representation away from people in such areas, and toward people in less populated areas with fewer children and less immediate contact with the challenges facing areas of dense child population. On the whole, the legislature will have less incentive to invest in programs and services that are most critical to child well-being. Because access to education and basic levels of health

---

[25] *See id.*

and economic well-being are critical for a child's future participation in society and civic life, using CVAP risks perpetuating long-term inequality. The need to provide equal representation for our children now, so that they, and the Nation, can benefit from such participation in the future, confirms why using total population is not only a constitutionally permissible metric, but also the correct and controlling one.

B. Using CVAP Ignores The Substantial Number Of Underage Citizens Who Will "Age Into" The Voting Population.

Using CVAP as a required or controlling metric also ignores that underage citizens will "age into" the voting population over the course of the decade-long life span of an the apportionment plan. Thus, where there are higher concentrations of youth, over time the percentage of voters will increase. Plaintiffs and their *amici* argue that it is unfair for eligible voters to have their votes "diluted," simply based on where they live. By the same logic, it is similarly unfair to ignore the electoral equality interests of underage citizens who will become voters, simply because of when the data was collected.

To illustrate this point, one can look to the American Community Survey ("ACS") data, which is what Plaintiffs use for their arguments about CVAP deviations. As many have and presumably will point out to the Court, in contrast to the Census the ACS data is based on sampling. Thus, while this data is sufficiently reliable to make broad-brush observations, it lacks the granularity necessary to make apportionment determinations at the census-block level. Nevertheless, ACS data provides indicators of the high portion – and uneven distribution – of persons who would not be counted in CVAP

apportionment but who will age into the voting population.

According to the 2009-2013 historical ACS estimate, there are over 3.4 million children in Texas aged 9-17. See Appendix 2, attached hereto. That equates, on average, to nearly 110,000 people per senate district, almost all of whom are citizens and will be eligible to vote in the upcoming elections while the current apportionment plan is in effect. This is a large number compared to the districts' average ("ideal") citizen voting age population, which Plaintiffs allege is only 502,000.

Moreover, as reflected above and in the Appendix, these populations are not evenly distributed. For example, Senate District 27 has nearly 130,000 people who are underage now but will reach the age of 18 before the next Census, as compared to only 91,000 in Senate District 14. Even if lines were re-drawn, one cannot eliminate the fact that children are more densely concentrated in certain areas compared to others. Apportioning seats by CVAP would inevitably leave certain senate districts with larger concentration of underage people who will age in over the course of a decade.

Thus, using CVAP will not only undermine the principles of representational equality for children and people in areas with high child populations; it will also do a poor job of providing *electoral equality*. People in areas with high child populations will see their districts steadily packed with more voting-eligible 18-years-olds, and their votes inevitably will become "diluted" during the life of a plan. A plan that dilutes the votes of those with the greatest stake in children's well-being will necessarily – and likely negatively – impact the most consequential policy

decisions and resource choices for children's well-being.

For these additional reasons, there is no basis to require that States exclude children when defining the apportionment base, although that is the effect of what Plaintiffs argue. To avoid such inequitable and absurd results, the Court should confirm that total population is the presumptively proper apportionment base, or at least that States have discretion in what metric they use, based on their particular demographic characteristics and the pursuit of the constitutionally permissible objective of representational equality.

CONCLUSION

For these reasons, and those stated by Appellees, the decision of the District Court should be affirmed.

Respectfully submitted,

ROBERT BRANDON
JON SHERMAN
ARCHITA TAYLOR
FAIR ELECTIONS LEGAL NETWORK
1825 K Street NW
Suite 450
Washington DC 20006
(202) 331-1550

CORY D. SZCZEPANIK
SIDLEY AUSTIN LLP
2001 Ross Avenue
Suite 3600
Dallas, TX 75201
(214) 981-3300

DAVID R. CARPENTER*
JOSE SANCHEZ
SIDLEY AUSTIN LLP
555 West Fifth Street
#4000
Los Angeles, CA 90013
drcarpenter@sidley.com

CAMERON F. KERRY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000

Counsel for Amici Curiae

* Counsel of Record

September 25, 2015

APPENDICES

APPENDIX 1

Child Population Data By County (Texas)

Source: Center for Public Policy Priorities analysis of 2000 Decennial Census Data from Summary File 3 and 2010 Decennial Census Redistricting Data, U.S. Census Bureau:

County	Child Pop (2013)	Child Pop. as % of Total Pop. (2013)	% Change in Child Pop. 2000-2010
Anderson	11,361	19.3%	0.38%
Andrews	4,756	28.8%	5.15%
Angelina	23,727	26.4%	4.74%
Aransas	4,538	18.6%	-15.39%
Archer	2,089	22.6%	-12.46%
Armstrong	376	19.3%	-24.33%
Atascosa	12,965	27.5%	4.95%
Austin	7,014	24.0%	11.83%
Bailey	2,182	30.6%	10.97%
Bandera	3,759	17.9%	-7.58%
Bastrop	20,037	25.5%	20.49%
Baylor	733	20.2%	-19.83%
Bee	6,885	21.2%	-7.61%
Bell	93,237	28.5%	28.19%
Bexar	482,300	26.6%	17.36%
Blanco	2,129	20.1%	11.90%
Borden	125	19.0%	-22.91%
Bosque	3,973	21.5%	-0.71%
Bowie	22,183	23.5%	1.27%

Brazoria	90,353	27.3%	25.88%
Brazos	44,666	22.0%	21.68%
Brewster	1,964	21.2%	-4.43%
Briscoe	327	21.2%	-25.36%
Brooks	1,985	27.2%	-20.30%
Brown	9,066	23.3%	-6.27%
Burleson	3,970	22.7%	-8.55%
Burnet	9,850	22.2%	18.56%
Caldwell	9,616	24.5%	10.21%
Calhoun	5,559	25.6%	-3.55%
Callahan	3,215	23.0%	-4.53%
Cameron	135,886	32.3%	18.45%
Camp	3,282	26.0%	8.16%
Carson	1,482	24.2%	-12.61%
Cass	6,921	22.5%	-6.66%
Castro	2,386	29.7%	-8.05%
Chambers	9,951	27.1%	33.05%
Cherokee	13,463	25.6%	7.31%
Childress	1,470	20.9%	-11.24%
Clay	2,346	21.6%	-10.71%
Cochran	820	27.2%	-21.94%
Coke	644	19.7%	-25.80%
Coleman	1,908	21.6%	-9.30%
Collin	235,062	27.5%	59.00%
Collingsworth	798	27.0%	-0.12%
Colorado	4,935	22.9%	-4.81%
Comal	26,562	22.4%	29.04%
Comanche	3,267	23.3%	-4.82%
Concho	562	13.9%	-9.56%
Cooke	9,678	24.6%	-1.12%
Coryell	21,997	28.6%	6.77%
Cottle	341	22.9%	-23.25%
Crane	1,312	27.7%	1.18%

Crockett	963	25.7%	-16.12%
Crosby	1,626	27.2%	-19.64%
Culberson	634	26.5%	-30.30%
Dallam	2,068	29.7%	1.26%
Dallas	671,039	27.3%	5.69%
Dawson	3,329	24.0%	-10.82%
Deaf Smith	6,103	31.6%	0.97%
Delta	1,109	21.0%	-13.06%
Denton	193,223	26.8%	51.74%
DeWitt	4,550	22.0%	-5.61%
Dickens	451	19.2%	-3.91%
Dimmit	3,118	28.3%	-11.76%
Donley	689	19.0%	-11.45%
Duval	2,911	25.0%	-20.50%
Eastland	4,133	22.1%	-2.00%
Ector	43,274	29.0%	8.12%
Edwards	387	20.8%	-32.31%
El Paso	239,807	28.9%	28.75%
Ellis	42,770	27.4%	10.76%
Erath	9,007	22.6%	4.14%
Falls	3,666	21.0%	-24.51%
Fannin	7,389	21.4%	3.49%
Fayette	5,198	20.9%	6.57%
Fisher	777	20.1%	-13.65%
Floyd	1,692	27.1%	-23.66%
Foard	240	18.7%	-33.65%
Fort Bend	184,974	28.4%	53.20%
Franklin	2,555	24.0%	13.18%
Freestone	4,567	22.7%	9.66%
Frio	4,254	23.4%	-8.61%
Gaines	6,561	34.9%	20.55%
Galveston	75,926	24.8%	10.91%
Garza	1,253	19.2%	-6.59%

Gillespie	5,020	19.5%	12.35%
Glasscock	314	25.1%	-25.27%
Goliad	1,548	20.8%	-8.09%
Gonzales	5,412	26.6%	3.09%
Gray	5,825	25.2%	2.00%
Grayson	28,860	23.4%	4.14%
Gregg	31,509	25.2%	4.13%
Grimes	6,007	21.8%	3.80%
Guadalupe	37,940	26.5%	43.72%
Hale	10,215	28.7%	-5.75%
Hall	816	24.5%	-15.74%
Hamilton	1,744	20.6%	-7.30%
Hansford	1,599	29.0%	8.20%
Hardeman	967	24.0%	-14.94%
Hardin	14,301	25.1%	5.63%
Harris	1,175,042	27.2%	16.58%
Harrison	17,118	25.6%	1.87%
Hartley	1,303	21.2%	18.84%
Haskell	1,171	20.0%	-15.13%
Hays	43,280	24.7%	62.14%
Hemphill	1,125	28.2%	18.85%
Henderson	17,919	22.4%	-0.05%
Hidalgo	271,384	33.2%	33.57%
Hill	8,357	23.7%	1.91%
Hockley	6,189	26.3%	-5.91%
Hood	10,780	20.3%	12.47%
Hopkins	8,910	25.0%	7.65%
Houston	4,621	19.8%	-8.40%
Howard	7,942	22.0%	-3.46%
Hudspeth	919	26.7%	-8.24%
Hunt	21,684	24.5%	5.37%
Hutchinson	5,609	25.8%	-10.98%
Irion	354	20.5%	-22.20%

Jack	1,905	20.9%	-2.88%
Jackson	3,657	25.1%	-9.23%
Jasper	8,566	24.2%	-5.76%
Jeff Davis	366	16.4%	-13.91%
Jefferson	60,098	23.7%	-7.54%
Jim Hogg	1,474	28.2%	-7.79%
Jim Wells	11,976	28.6%	-4.80%
Johnson	41,539	26.4%	12.68%
Jones	3,543	18.0%	-20.11%
Karnes	2,891	19.2%	-11.98%
Kaufman	29,857	27.6%	42.86%
Kendall	8,524	22.6%	25.26%
Kenedy	92	21.9%	-15.70%
Kent	175	21.8%	4.52%
Kerr	9,957	19.6%	1.22%
Kimble	897	19.1%	-11.08%
King	58	20.1%	-43.33%
Kinney	689	18.8%	-16.59%
Kleberg	8,171	25.5%	-6.40%
Knox	955	25.0%	-20.17%
La Salle	1,538	20.9%	-4.52%
Lamar	11,978	23.8%	-6.06%
Lamb	3,870	28.1%	-0.45%
Lampasas	4,846	23.7%	-13.29%
Lavaca	4,331	22.2%	-4.30%
Lee	4,007	23.6%	-3.64%
Leon	3,688	21.6%	0.64%
Liberty	19,540	24.7%	-0.05%
Limestone	5,368	23.0%	-1.48%
Lipscomb	890	25.7%	8.07%
Live Oak	2,290	19.4%	-14.06%
Llano	3,089	15.7%	13.50%
Loving	7	8.5%	-30.77%

Lubbock	72,241	24.7%	9.00%
Lynn	1,533	26.6%	-19.52%
Madison	2,987	21.2%	-6.72%
Marion	1,900	18.1%	5.13%
Martin	1,530	28.7%	-40.20%
Mason	828	19.9%	9.77%
Matagorda	9,285	25.4%	-17.83%
Maverick	18,193	32.5%	-9.57%
McCulloch	1,948	23.4%	1.79%
McLennan	60,749	25.1%	-15.03%
McMullen	146	18.1%	4.95%
Medina	11,825	24.6%	4.27%
Menard	438	19.2%	-23.25%
Midland	41,181	27.0%	7.12%
Milam	6,116	25.1%	-1.56%
Mills	1,165	23.4%	-9.04%
Mitchell	1,749	18.8%	-5.26%
Montague	4,495	22.5%	-1.35%
Montgomery	131,311	26.4%	45.25%
Moore	6,946	31.4%	3.64%
Morris	3,021	22.9%	-8.39%
Motley	245	20.5%	-22.81%
Nacogdoches	16,059	24.7%	6.00%
Navarro	13,046	26.5%	5.12%
Newton	3,172	21.8%	-15.01%
Nolan	3,777	25.1%	-8.08%
Nueces	88,229	25.1%	-0.97%
Ochiltree	3,387	31.4%	17.41%
Oldham	567	27.2%	-8.76%
Orange	20,331	24.6%	-11.54%
Palo Pinto	6,942	24.3%	0.13%
Panola	5,817	24.0%	2.25%
Parker	29,620	24.4%	22.64%

Parmer	2,985	30.0%	-2.46%
Pecos	3,849	24.3%	-17.79%
Polk	9,607	20.4%	1.51%
Potter	34,422	27.7%	5.83%
Presidio	2,176	27.3%	-5.23%
Rains	2,239	20.3%	8.84%
Randall	31,651	24.9%	10.62%
Reagan	1,042	28.7%	-11.17%
Real	591	17.7%	-7.56%
Red River	2,577	20.8%	-19.54%
Reeves	3,054	22.0%	-19.91%
Refugio	1,673	23.0%	-12.87%
Roberts	239	25.8%	6.31%
Robertson	4,058	23.9%	-6.69%
Rockwall	24,126	28.4%	81.48%
Runnels	2,522	24.5%	-15.01%
Rusk	12,105	22.6%	4.99%
Sabine	1,989	18.0%	-4.12%
San Augustine	1,784	20.0%	-12.15%
San Jacinto	6,248	22.7%	12.98%
San Patricio	18,011	27.4%	-12.47%
San Saba	1,186	19.6%	-25.55%
Schleicher	1,042	30.3%	34.51%
Scurry	4,355	24.9%	2.87%
Shackelford	776	22.8%	-5.33%
Shelby	6,682	25.7%	0.31%
Sherman	847	27.6%	-8.40%
Smith	53,950	25.1%	15.70%
Somervell	2,097	24.2%	16.07%
Starr	20,238	32.6%	3.17%
Stephens	2,173	23.0%	-2.37%
Sterling	294	23.8%	-30.25%

Stonewall	301	21.2%	-12.18%
Sutton	1,063	25.9%	-3.32%
Swisher	1,948	25.4%	-12.23%
Tarrant	522,356	27.3%	24.75%
Taylor	33,144	24.6%	-4.46%
Terrell	185	20.7%	-24.04%
Terry	3,277	25.9%	-9.37%
Throckmorton	325	20.1%	-21.46%
Titus	9,691	29.5%	16.02%
Tom Green	27,490	24.0%	-4.41%
Travis	267,301	24.1%	27.00%
Trinity	2,784	19.6%	-3.58%
Tyler	4,204	18.9%	-10.03%
Upshur	9,554	23.8%	2.12%
Upton	895	27.0%	-8.32%
Uvalde	7,585	28.3%	-6.12%
Val Verde	14,355	29.6%	1.27%
Van Zandt	12,307	23.0%	2.85%
Victoria	23,454	26.2%	-5.41%
Walker	11,632	16.8%	1.82%
Waller	11,052	24.4%	27.07%
Ward	3,007	26.6%	-12.47%
Washington	7,430	21.6%	-0.73%
Webb	90,052	33.8%	26.19%
Wharton	10,751	26.0%	-6.46%
Wheeler	1,453	24.9%	4.26%
Wichita	31,288	23.5%	-8.19%
Wilbarger	3,269	24.8%	-15.32%
Willacy	5,691	25.8%	-6.63%
Williamson	128,180	27.7%	62.15%
Wilson	11,270	24.7%	19.91%
Winkler	2,110	28.1%	-1.45%
Wise	15,493	25.2%	11.59%

Wood	8,458	19.6%	6.24%
Yoakum	2,513	30.7%	6.43%
Young	4,536	23.8%	-0.58%
Zapata	4,890	34.1%	19.38%
Zavala	3,666	30.3%	-7.48%

APPENDIX 2

Child Population by State Senate District, based on 2009-2013 Historical American Community Survey Estimate (ordered from lowest to highest according to percentage of children).

SD	Pop. under 18 (%)	Total Pop Under 18	Pop. Ages 9-17
SD 14	23.0%	198,989	102,928
SD 3	23.7%	200,080	113,599
SD 17	23.9%	196,100	101,979
SD 28	24.4%	190,398	114,810
SD 16	24.5%	204,660	101,358
SD 30	24.6%	206,982	123,720
SD 1	24.7%	203,039	124,334
SD 5	24.7%	209,643	114,590
SD 24	25.1%	202,219	119,062
SD 25	25.1%	213,895	116,619
SD 26	25.8%	208,425	107,459
SD 11	26.2%	214,119	115,012
SD 13	26.4%	209,586	98,161
SD 22	26.6%	218,370	91,305
SD 4	26.7%	222,881	104,058
SD 18	27.1%	229,664	95,868
SD 10	27.4%	233,088	96,799
SD 12	27.5%	230,864	112,644
SD 15	27.5%	226,978	117,756
SD 8	27.6%	227,448	129,590
SD 2	27.6%	228,131	119,112
SD 31	27.7%	224,002	109,625
SD 23	28.7%	235,491	111,611
SD 9	28.8%	240,967	96,868

SD 19	29.1%	239,001	109,398
SD 21	29.2%	239,019	101,718
SD 7	29.3%	240,849	129,837
SD 29	29.5%	244,536	92,525
SD 20	30.4%	258,540	122,974
SD 6	31.8%	263,501	104,820
SD 27	33.1%	262,753	107,392
		Total 9-17	3,407,531
		Avg. 9-17	109,920

No. 14-940

Supreme Court, U.S.
FILED
SEP 24 2015
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SUE EVENWEL, et al.,

Appellants,

v.

GREG ABBOTT, in his official capacity as Governor of Texas, et al.,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

BRIEF OF *AMICUS CURIAE* COMMON CAUSE IN SUPPORT OF APPELLEES AND AFFIRMANCE

EMMET J. BONDURANT
Counsel of Record
JEREMY D. FARRIS
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
Bondurant@bmelaw.com
(404) 881-4100

Counsel for Common Cause

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 8

I. THE EQUAL PROTECTION CLAUSE REQUIRES THAT SINGLE-MEMBER STATE LEGISLATIVE DISTRICTS, LIKE CONGRESSIONAL DISTRICTS, BE APPORTIONED TO CONTAIN EQUAL NUMBERS OF PEOPLE 8

A. "Equal Representation For Equal Numbers Of People" Is The Fundamental Principle Of Representative Government 8

B. Each Person's Right To "Equal Representation For Equal Numbers Of People" Is Carried Forward To The States By The Equal Protection Clause Of The Fourteenth Amendment 12

C. *Reynolds* Held That State Legislative Districts Must Be Redistricted On A Total-Population Basis 15

D. When Governmental Units Are Chosen By Single-Member Districts, "Fair And Effective Representation" Requires That Each District Contain Roughly Equal Numbers Of People 22

TABLE OF CONTENTS – Continued

Page

II. THE RIGHT TO AN EQUALLY-WEIGHTED VOTE, AS GUARANTEED BY THE EQUAL PROTECTION CLAUSE, DOES NOT REQUIRE THAT STATE LEGISLATIVE DISTRICTS BE REDISTRICTED TO CONTAIN EQUAL NUMBERS OF ELIGIBLE VOTERS 26

A. The Right To A Vote Of The Same Weight Presupposes An Already-Defined Constituency And The Geographical Unit From Which A Representative Is Chosen 28

B. Because The Right To A Vote Of The Same Weight Is Constituency-Specific, It Does Not Require That Separate Constituencies Have The Same Number Of Voters 30

III. NOTHING IN *BURNS V. RICHARDSON* SUGGESTS THAT PLAN S172 VIOLATES THE EQUAL PROTECTION CLAUSE 32

IV. THIS COURT SHOULD NOT HOLD THAT THE APPELLANTS HAVE STATED AN EQUAL-PROTECTION CLAIM 38

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES

Avery v. Midland Cnty., 390 U.S. 474 (1968).....*passim*

Baker v. Carr, 369 U.S. 186 (1962).....16

Branch v. Smith, 538 U.S. 254 (2003).....16

Burns v. Richardson, 384 U.S. 73 (1966).....*passim*

Bush v. Gore, 531 U.S. 98 (2000).....7, 28, 32

Carrington v. Rash, 380 U.S. 89 (1965).....28

Chisom v. Roemer, 501 U.S. 380 (1991).....5, 26

Colegrove v. Green, 328 U.S. 549 (1946).....17

Gaffney v. Cummings, 412 U.S. 735 (1973).....15

Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990).....36

Gray v. Sanders, 372 U.S. 368 (1963).....*passim*

Hadley v. Junior College Dist. of Metro. Kansas City, 397 U.S. 50 (1970).....24, 25, 26

Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).....28

Mahan v. Howell, 410 U.S. 315 (1973).....15

Malloy v. Hogan, 378 U.S. 1 (1964).....9

Reynolds v. Sims, 377 U.S. 533 (1964).....*passim*

Twining v. New Jersey, 211 U.S. 78 (1908).....9

United States v. Mosley, 238 U.S. 383 (1915).....28

Wesberry v. Sanders, 376 U.S. 1 (1964).....*passim*

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. preamble 9

U.S. Const. art. I, § 2 ..... *passim*

U.S. Const. art. I, § 9 9

U.S. Const. art. I, § 10 9

U.S. Const. amend. XIV, § 1 ..... *passim*

U.S. Const. amend. XIV, § 2 ..... 13, 14

STATUTES

Northwest Ordinance, art. II, 32 Journals of the Continental Congress (U.S. 1787) 11

OTHER AUTHORITIES

Brief for the United States, *County of Los Angeles v. Garza*, 498 U.S. 1028 (1991) (No. 90-849) 39

Cong. Globe, 39th Cong., 1st Sess., 2767 (1866) (Remarks of Senator Jacob Howard) 14

THE DECLARATION OF INDEPENDENCE (U.S. 1776) 9

THE FEDERALIST NO. 54 (James Madison) 10, 11

THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911) 10

United States Comm'n on Civil Rights, *Political Participation* (1968) 21

INTEREST OF *AMICUS CURIAE*

Amicus curiae Common Cause is a nonpartisan, grassroots organization dedicated to fair elections and making government at all levels more democratic, open, and responsive to the interests of all people. Founded by John Gardner in 1970 as a "citizens lobby," Common Cause has over 400,000 members nationwide and local organizations in 35 states. Common Cause is a leader in the fight for open, honest, and fair elections. Common Cause is also a leading proponent of redistricting reforms and a vigorous opponent of partisan gerrymanders and voter suppression by both political parties.[1]

SUMMARY OF THE ARGUMENT

"State legislatures are, historically, the fountainhead of representative government in this country." *Reynolds v. Sims*, 377 U.S. 533, 564 (1964). The "clearly established . . . fundamental principle of representative government in this country is one of equal representation for equal numbers of people." *Id.* at 560-61 (citing *Wesberry v. Sanders*, 376 U.S. 1 (1964)). This uniform principle controls the apportionment of both congressional districts under Article I, Section 2,

[1] Pursuant to Rule 37, *Amicus* hereby represents that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution toward its preparation or submission. The parties have filed their consent to the filing of this brief with this Court.

Wesberry, 376 U.S. at 18, and state legislative districts under the Equal Protection Clause, *Reynolds*, 377 U.S. at 564. It requires single-member congressional and state legislative districts to contain approximately equal numbers of persons, without regard to their status as citizens or voters.

In Plan S172, the Texas legislature redistricted Texas's senate districts on a total-population basis. Like every other state, Texas redistricted its single-member legislative districts to contain substantially equal numbers of persons based on the decennial census. The question before this Court is not whether the Texas legislature might have chosen another basis of apportionment – for example, the total number of citizens or registered voters. The only question before this Court is whether Texas's apportionment of its Senate districts to contain equal numbers of people violates the Equal Protection Clause of the Fourteenth Amendment. The answer is "no," for a straightforward reason: Equal protection *requires* that states apportion single-member legislative districts to contain roughly equal numbers of persons.

In *Reynolds*, this Court interpreted the Equal Protection Clause to apply the fundamental principle of "equal representation for equal numbers of people" to the states. 377 U.S. at 560-61. *Reynolds* ruled that "as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis," *id.* at 568, and "that a state make

an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable," *id.* at 577. The *Reynolds* Court held, on the facts before it, that the legislative districts created by three Alabama redistricting schemes at issue violated equal protection because they contained unequal numbers of persons. In light of its *holding*, when the *Reynolds*'s Court said "equal in population," it meant simply that.

Reynolds established a rule for representation in the state legislatures under the Equal Protection Clause that is substantially equivalent to the rule established by *Wesberry* for representation in the House of Representatives under Article I, Section 2. Every *person*, independent of citizenship and voting status, is subject to the laws of the state in which she inhabits. The Equal Protection Clause guarantees to every *person* subject to a state's jurisdiction, independently of her citizenship or voting status, "the equal protection of the laws." U.S. Const. amend. XIV, § 1. *Reynolds* and its progeny make clear that equal representation – "the fundamental principle of representative government in this country" – is a constitutional requirement of the Equal Protection Clause that works to achieve its guarantee. When persons are equally represented in the law-making of their representative government, the government is less likely to enact laws that create arbitrary or invidious classifications among them. *See Avery v. Midland Cnty.*, 390 U.S. 474, 485-86 (1968); *Reynolds*, 377 U.S. at 560-61.

The appellants offer a different reading of *Reynolds*. In their view, *Reynolds* held that equal protection requires state legislative redistricting to be conducted on a voter basis, such that each legislative district contain equal numbers of registered or eligible voters. This is incorrect: The Equal Protection Clause could not have required Alabama to have redistricted its state legislative districts on a registered-voter or eligible-voter basis in 1964, when a huge percentage of Alabama's minority population was neither registered nor eligible to vote because of discriminatory state action. If Alabama had been constitutionally required to redistrict its legislative districts on an eligible-voter or registered-voter basis, the result would have perpetuated the disadvantage of Alabama's minority population in the state legislature. In *Burns v. Richardson*, this Court warned against exactly that kind of entrenchment of "underrepresentation of groups constitutionally entitled to participate in the electoral process." 384 U.S. 73, 92-93 (1966). The appellants' suggestion that *Reynolds* established a constitutional standard that state legislative districts be apportioned to contain equal numbers of registered or eligible voters misunderstands the holding of that case and misapprehends the meaning of equal protection.

The appellants' rights to equal representation in the Texas Senate have not been infringed because the total population of each senate district is roughly equal. So, the appellants build their claim on their right to cast a vote of the same weight and subject to the same treatment – a right customarily summarized

by the slogan, "one person, one vote." *Chisom v. Roemer*, 501 U.S. 380, 402 n.31 (1991). Appellants claim that this right is violated by Plan S172 because their respective senate districts contain more people who are eligible to vote than other equally-populated senate districts. The appellants complain that their votes *may* have less influence on the outcome of a senate election in their districts, as compared to votes cast in other senate elections held in other districts for other candidates for the Texas senate.

The right to cast a vote of the same weight, however, does not require each district in a legislative body to contain an equal number of eligible voters. As this Court made clear in *Gray v. Sanders* – which gave birth to the "one person, one vote" principle – the Equal Protection Clause guarantees the right of a voter to cast a ballot of the same weight as every other ballot cast by a voter of the same constituency, "[o]nce the geographical unit for which a representative is to be chosen is designated." 372 U.S. 368, 379 (1963). In holding that Georgia's county-unit system for statewide elections violated the Equal Protection Clause, the *Gray* Court made clear that the right to a vote of equal weight was constituency-specific. *Id.* at 379, 381-82. An elector's right to a vote of the same weight is not implicated by the votes cast by other electors, residing in other electoral districts, voting for other sets of candidates, vying for other offices. The right to an equally-weighted vote is measured against the treatment and counting of other voters and ballots within the same election unit or district.

Further, *Burns v. Richardson* does not remotely support the appellants' contention that equal protection requires Texas to apportion its senate districts on an eligible-voter or registered-voter basis. In fact, the *Burns* Court explicitly disclaimed that view of its holding. 384 U.S. at 96. *Burns* held under the Equal Protection Clause that Hawaii was *permitted* to apportion its legislative districts on a registered-voter basis *because* its apportionment approximated an apportionment on a total-population basis and did not underrepresent any group in the state legislature. *Burns* allowed an exception to *Reynolds*'s constitutional standard only under narrow conditions. Because equal protection does not always permit a scheme by which state legislative districts are apportioned to contain equal numbers of registered voters, *a fortiori*, it does not require it. Moreover, because Texas redistricted its senate districts on a total-population basis, this case does not present the question – as presented in *Burns* – whether a state's redistricting may permissibly depart from the constitutional rule of equal representation for equal numbers of people. *Burns* is unavailing for the appellants.

A ruling in favor of the appellants would unsettle equal protection doctrine: It would mean that the legislatures of every state are unconstitutionally apportioned, requiring that both houses of those state legislatures be reapportioned based on estimates of registered or eligible voters, which is subject to arbitrariness and the abuse of perpetuating underrepresentation. *Burns*, 384 U.S. at 92-93. It would also

create an indefensible situation in which states would be required by Article I, Section 2 to use total population as the basis for the redistricting of congressional districts, but be prohibited by the Equal Protection Clause from using the same standard when redistricting state legislative districts. Finally, it would break the structural link between the right of every *person* to equal protection under the laws enacted by the state legislature and the right of every *person* subject to those laws to equal representation in the houses of that legislature.

The appellants have not stated a claim under the Equal Protection Clause. Equal protection guarantees rights to persons to equal representation. *See, e.g.*, *Reynolds*, 377 U.S. at 568, 577. Plan S172 does not infringe that right because it creates senate districts containing roughly equal numbers of persons. Equal protection also guarantees rights to electors to cast a vote of the same weight and treatment as the votes cast by other electors voting in the same, pre-defined constituency for the same set of candidates vying for the same office. *See, e.g.*, *Bush v. Gore*, 531 U.S. 98, 104-05 (2000); *Gray*, 372 U.S. at 379. Plan S172 does not infringe that right because it does not unequally weigh or disparately treat the votes cast in any given constituency for candidates vying for the same seat in the Texas Senate. And Plan S172 does not conflict with *Burns* because that decision neither holds nor even implies that equal protection requires a registered-voter basis for the apportionment of state legislative districts. Appellant's equal-protection

challenge to Plan S172 necessarily fails. The ruling of the district court should be affirmed.

ARGUMENT

I. THE EQUAL PROTECTION CLAUSE REQUIRES THAT SINGLE-MEMBER STATE LEGISLATIVE DISTRICTS, LIKE CONGRESSIONAL DISTRICTS, BE APPORTIONED TO CONTAIN EQUAL NUMBERS OF PEOPLE.

A. "Equal Representation For Equal Numbers Of People" Is The Fundamental Principle Of Representative Government.

"[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Reynolds*, 377 U.S. at 560-61. This constitutional principle requires an equipopulous apportionment of single-member districts comprising a federal, state, or local governmental body. *Avery*, 390 U.S. at 485-86 (requiring equal population among local government districts); *Reynolds*, 377 U.S. at 577 (requiring equal population among state legislative districts); *Wesberry*, 376 U.S. at 18 (requiring equal population among districts comprising the House of Representatives).

The principle of equal representation for equal numbers of people truly is "fundamental." *Reynolds*, 377 U.S. at 560. In our constitutional system, both the federal and state governments derive their authority from the people they govern. *See* U.S. Const. Preamble (deriving authority from "We the People"); The Declaration of Independence para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed."). The sovereignty of the people is and remains one in which each person has an equal share. *See* U.S. Const. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States"); U.S. Const. art. I, § 10, cl. 1 ("No State shall . . . grant any Title of Nobility"). Representation is the conduit through which the inherent, equally-divisible authority of the people is transmitted to government.

Conversely, each person in the United States is equally subject to the authority of federal and state government. Because those governments are republican in form, representation is essential to legitimately subject persons to the laws they enact. *See Reynolds*, 377 U.S. at 565 (finding that "[s]ince legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will"); *see also Twining v. New Jersey*, 211 U.S. 78, 106 (1908), overruled on other grounds by *Malloy v. Hogan*, 378 U.S. 1 (1964), ("[I]n a free representative government nothing is more fundamental than the right of the people through their appointed servants

to govern themselves in accordance with their own will.").

"[T]he achieving of fair and effective representation . . . is concededly the basic aim of legislative apportionment." *Reynolds*, 377 U.S. at 565-66. The Founders achieved that aim with respect to the apportionment of representatives among the States by requiring that representation be allocated by the numbers of people in each State. U.S. Const. art. I, § 2. "The debates at the Convention make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants." *Wesberry*, 376 U.S. at 13; *see also id.* at 13-14 ("'numbers of inhabitants' should always be the measure of representation in the House of Representatives" (quoting I THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Farrand ed. 1911) 579-80)).

The Founders were clear that seats in the national legislature would be apportioned according to numbers of persons, not according to the number of electors. In Federalist 54, Madison was explicit about the distinction:

> It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States, is to be determined by a fœderal rule founded on the aggregate number of inhabitants, so the right of choosing this allotted

> number in each State is to be exercised by such part of the inhabitants, as the State itself may designate. . . . In every State, a certain proportion of inhabitants are deprived of this right [to vote] by the Constitution of the State, who will be included in the census by which the Fœderal Constitution apportions the representatives.

THE FEDERALIST NO. 54, 369 (James Madison) (Jacob Cooke ed., 1961). This principle of apportionment according to total population would become a common standard: "The original constitutions of 36 of our States provided that representation in both houses of the state legislatures would be based completely, or predominantly, on population." *Reynolds*, 377 U.S. at 573 (internal citation omitted). Furthermore, "[t]he Northwest Ordinance, adopted in the same year, 1787, as the Federal Constitution, provided for the apportionment of seats in territorial legislatures solely on the basis of population." *Id.*; *see also* Northwest Ordinance, art. II, 32 Journals of the Continental Congress 340 (U.S. 1787) ("The inhabitants of the said territory shall always be entitled to the benefits . . . of a proportionate representation of the people in the legislature.").

In *Wesberry*, this Court relied on this history and interpreted Article I, Section 2 to hold that congressional districts drawn by state legislatures must contain substantially the same numbers of persons. 376 U.S. at 18; *see also Reynolds*, 377 U.S. at 559 (finding that *Wesberry* "determine[d] that the constitutional

test for the validity of congressional districting schemes was one of substantial equality of population among the various districts established by a state legislature for the election of members of the Federal House of Representatives"). Although *Wesberry* considered congressional apportionments under Article I, Section 2, and not the apportionment of state legislatures, the decision "clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people." *Reynolds*, 377 U.S. at 560-61.

B. Each Person's Right To "Equal Representation For Equal Numbers Of People" Is Carried Forward To The States By The Equal Protection Clause Of The Fourteenth Amendment.

All persons within a state's jurisdiction are subject to the laws enacted by its legislature, without regard to their citizenship or eligibility to vote. In representative government, legislators are elected to represent all persons in their districts, not merely those who are citizens or eligible to vote. Accordingly, *all* persons are represented when a legislature exercises its power to enact law. The Fourteenth Amendment applies this axiom of representative government with respect to representation in Congress and in the state legislatures.

Section 2 of the Fourteenth Amendment apportions representatives in the national legislature among the states on the basis of the number of persons residing in each state. U.S. Const. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. . . ."). The choice of apportionment of Members of the House of Representatives among the states according to numbers of persons, as opposed to voters, was deliberate. When introducing the proposed Fourteenth Amendment to the Senate on behalf of the joint committee of fifteen that drafted it, Senator Jacob Howard said:

> Nor did the committee adopt the principle of making the ratio of representation depend upon the number of voters, for it so happens that there is an unequal distribution of voters in the several States, the old States having proportionally fewer than the new States. It was desirable to avoid this inequality in fixing the basis. The committee adopted numbers as the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such, I think, after all, is the safest and most secure principle upon which the Government can rest. *Numbers, not voters; numbers, not property; this is the theory of the Constitution.*

Cong. Globe, 39th Cong., 1st Sess., 2767 (1866) (Senator Jacob Howard on behalf of the joint committee) (emphasis added). Section 2 of the Fourteenth Amendment confirms that it is persons who are the basis of representation.

The Equal Protection Clause of Section 1 of the Fourteenth Amendment not only applies this basic axiom of representative government to the state legislatures, but also links it to the principle of equality that the clause creates. The guarantees of equal protection are accorded to "persons" – not only to "citizens" or to a subset of citizens, such as qualified "electors." The Fourteenth Amendment makes reference to all three groups, but its guarantee of "the equal protection of the laws" is expressly accorded to *persons* within a state's jurisdiction. U.S. Const. amend. XIV, § 1.

Thus, it is *persons* who are represented and *persons* who are accorded equal protection. The symmetry is not fortuitous. The guarantee to *persons* of "equal protection of the laws" entails that those charged with enacting laws equally represent those persons subject to law and on whose behalf the law is made. But equal representation is not only a requirement of equal protection; it is also a constitutional structure by which the full guarantee of "the equal protection of the laws" is achieved. When the people are equally represented in the law-making of their representative government, the government is less likely to enact laws that create arbitrary or invidious classifications among them. For this reason,

the Equal Protection Clause applies the "fundamental principle . . . of equal representation for equal numbers of people" to the redistricting of state legislative districts. *Reynolds*, 377 U.S. at 560-61.

C. *Reynolds* Held That State Legislative Districts Must Be Redistricted On A Total-Population Basis.

Consistent with the Equal Protection Clause's emphasis on persons, *Reynolds* held that state legislative districts be redistricted to contain equal numbers of persons. *Reynolds*, 377 U.S. at 568. *Reynolds* held "that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.*; *accord Mahan v. Howell*, 410 U.S. 315, 321 (1973) (recognizing "[t]he basic constitutional principle [of] equality of population among the districts" (citing *Reynolds*, 377 U.S. at 578)); *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973) ("More fundamentally, *Reynolds* recognized that 'the achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment,' and it was for that reason that the decision insisted on substantial equality of populations among districts.") (internal citation omitted).

The *Reynolds* Court decided that state legislative districts must be apportioned "on a population basis," and it meant simply that. "By holding that as a federal constitutional requisite both houses of a state

legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal *population* as is practicable." 377 U.S. at 577 (emphasis added). The requirement that states must create districts of "as nearly of equal *population* as is practicable" means that states must create districts that contain roughly *equal numbers of persons*. *Id.* (emphasis added).

In *Burns v. Richardson*, the Court clouded the clarity of *Reynolds*'s holding. According to *Burns*'s dicta, *Reynolds* "left open the question what population was being referred to" – whether it be persons, citizens, eligible voters, registered voters – because "[t]he decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." *Burns*, 384 U.S. at 91-92. The seeming aperture, however, is illusory; *Burns*'s reading of *Reynolds* cannot be correct.

First, when this Court decided *Baker v. Carr*, 369 U.S. 186 (1962), *Wesberry*, and *Reynolds* it "crossed the Rubicon" with respect to choices involving the nature of representation. *Branch v. Smith*, 538 U.S. 254, 278 (2003). By the time *Burns* was decided, this Court had resolved that the basis of representation in Congress and the state legislatures was not a political question reserved to the states. *Wesberry*, for example, made an unmistakable choice about the nature of representation in the House of Representatives –

namely, that the fundamental principle of representative government is one of equal representation for equal numbers of people. 376 U.S. at 18. Although this Court had ruled that claims under the Guarantee Clause concerning the nature of representation presented nonjusticiable questions, *see, e.g.*, *Colegrove v. Green*, 328 U.S. 549, 556 (1946), this Court reached a different conclusion under the Equal Protection Clause, which "can and does require more," *Reynolds*, 377 U.S. at 582.

Second, the *Reynolds* Court did not "leave open" the question of which population it referred to. *Reynolds* held that Alabama's state legislative districts violated the guarantees of equal protection because they contained unequal numbers of persons. A review of the record facts in *Reynolds* permits no other conclusion. At issue was the constitutionality of the 1911 apportionment of – and two legislatively proposed plans to redistrict – the Alabama Senate and House of Representatives. The apportionment plan set forth in the 1901 Alabama Constitution required the legislature, after each decennial census, to apportion the Alabama Senate and House districts among Alabama's counties, "according to the number of inhabitants in them." *Id.* at 538 (quoting Ala. Const. art. IX, §§ 199-200 (1901)). Alabama had not apportioned its legislative districts since 1911, and, by 1962, the apportionments among the counties was nowhere near to their respective "number of inhabitants." *Id.* at 540.

The district court took "judicial notice of the facts that there had been population changes in Alabama's counties since 1901, [and] that the present representation in the State Legislature was not on a population basis." *Id.* at 542. After the district court's finding, the Alabama Legislature adopted two new reapportionment plans – a proposed constitutional amendment (the "67-Senator Amendment") and a back-up (the "Crawford-Webb Act") that would take effect in the event that the former failed to gain the approval of the statewide electorate or the federal courts. *Id.* at 543-44. At trial, the three-judge district court heard evidence regarding all three apportionment plans at issue and held that none satisfied the requirements of equal protection. *Id.* at 545, 547.

This Court affirmed. *Id.* at 588. When reviewing the findings of the district court, this Court emphasized that the three Alabama reapportionment plans allocated representatives to unequal numbers of *persons*. With respect to the 1911 Alabama apportionment, this Court noted the district court's finding:

> Population-variance ratios of up to about 41-to-1 existed in the Senate, and up to about 16-to-1 in the House. Bullock County, with a population of only 13,462, and Henry County, with a population of only 15,286, each were allocated two seats in the Alabama House, whereas Mobile County, with a population of 314,301, was given only three seats, and Jefferson County, with 634,864 *people*, had only seven representatives. With respect

> to senatorial apportionment, since the pertinent Alabama constitutional provisions had been consistently construed as prohibiting the giving of more than one Senate seat to any one county, Jefferson County, with over 600,000 *people*, was given only one senator, as was Lowndes County, with a 1960 population of only 15,417, and Wilcox County, with only 18,739 *people*.

Id. at 545-46 (emphasis added).

With respect to the proposed "67-Senator Amendment," this Court found that "[u]nder the 67-Senator Amendment . . . '[t]he present control of the Senate by members representing 25.1% of the *people* of Alabama would be reduced to control by members representing 19.4% of the *people* of the State.'" *Id.* at 547 (third alteration original) (emphasis added). The *Reynolds* Court found that the 67-Senator Amendment increased the representation of inhabitants of the urban counties in the Alabama House, but noted "[e]ven so, serious disparities from a population-based standard remained." *Id.* at 549. *Reynolds* noted that "Montgomery County, with 169,210 people, was given only four seats, while Coosa County, with a population of only 10,726, and Cleburne County, with only 10,911, were each allocated one representative." *Id.* at 549.

And, with respect to the proposed "Crawford-Webb Act," this Court found:

> Under this plan, about 37% of the State's *total population* would reside in counties

> electing a majority of the members of the Alabama House, with a maximum population-variance ratio of about 5-to-1. Each representative from Jefferson and Mobile Counties would represent over 52,000 *persons* while representatives from eight rural counties would each represent less than 20,000 *people*.

Id. at 549-50 (emphasis added). When the *Reynolds* Court discussed a population-based standard, it manifestly referred to a quantum of persons. *See id.*

The facts upon which the *Reynolds* Court explicitly grounded its decision concerned disparities in the representation of numbers of *people* – not voters. *See id.* at 545-50. On the record facts before it, the *Reynolds* Court held that the three Alabama reapportionment plans at issue violated the Equal Protection Clause because they allocated legislative seats to unequal numbers of people.

Third, *Reynolds could not* have left open the question of relevant population. Contrary to the appellants' reading, it certainly could not have meant that the Equal Protection Clause required that state legislative districts contain equal numbers of registered voters. In Alabama in 1964, an apportionment based on equal numbers of registered voters would not have created "fair and effective representation for all citizens." *Id.* at 565-66. At the time *Reynolds* was decided, a very large number of Alabamians of voting age were prevented from registering to vote by state officials. According to the United States Commission

on Civil Rights, in 1960, there were 214,804 nonwhite persons of voting age in Alabama; by May 1964, only 31,732 nonwhite persons of voting age (19.3%) were registered to vote. United States Comm'n on Civil Rights, *Political Participation*, 223 (1968). At the time *Reynolds* was argued and decided there was widespread arbitrary and disparate treatment of nonwhite persons of voting age across Alabama. For example, by May of 1964, in Walker County, 1,710 out of the 2,890 nonwhite persons of voting age were registered to vote. By contrast, there was not a single registered nonwhite voter in Lowndes and Wilcox counties, despite their minority populations of 5,122 and 6,085, respectively. *Id.* at 224-27.

Equal protection could not have required Alabama state legislative districts to be redistricted based on voters in 1964, when over eighty percent of Alabama's 214,804 nonwhite persons of voting age were not registered because of arbitrary and discriminatory state action. If, as the appellants suggest, Alabama had been constitutionally *required* to reapportion its legislative districts on a registered-voter basis in 1964, the result would have entrenched the disadvantage of Alabama's minority population in the state legislature. *Accord Burns*, 384 U.S. at 92 (finding that the use of an actual or registered-voter basis is "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process"). The appellants' implication that the Equal Protection Clause

required Alabama in 1964 to apportion its legislative districts on a registered-voter or eligible-voter basis gravely misapprehends the meaning of equal protection. The Equal Protection Clause did not permit (much less require) Alabama in 1964 to entrench discriminatory voter-registration or voter-eligibility laws by apportioning its legislative districts on a registered-voter or eligible-voter basis. The *Reynolds* Court did not so hold, and *Reynolds* cannot be read to have required that state districts be apportioned on a voter basis.

D. When Governmental Units Are Chosen By Single-Member Districts, "Fair And Effective Representation" Requires That Each District Contain Roughly Equal Numbers Of People.

The application of the "fundamental principle of representative government in this country . . . of equal representation for equal numbers of people" does not end at state legislative districts. *Reynolds*, 377 U.S. at 560-61. Rather, "fair and effective representation" of every person subject to the jurisdiction of a governmental entity means that even local governmental units must "not be apportioned among single-member districts of substantially unequal population." *Avery*, 390 U.S. at 485-86. This Court's decision in *Avery* further focuses the equal-protection requirement that single-member districts comprising a governmental body must be apportioned to contain substantially the same number of persons.

In *Avery*, this Court interpreted the Equal Protection Clause to hold that if an entity exercises general governmental powers over a geographical area comprised of single-member districts, then those districts must be apportioned to contain substantially equal populations. *Id.* In that case, four elected officials of a county commissioner's court were drawn from four single-member districts of disparate population. Even though one urban district contained 67,906 people and another rural district contained only 414 people, each district was represented by a single commissioner. On these facts, the *Avery* Court held that the Equal Protection Clause "permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body." *Id.* at 485.

Avery did not ground its holding on the fact that the four single-member districts contained unequal numbers of voters. *See id.* Rather, the *Avery* Court identified the "relevant fact . . . [to be] that the powers of the Commissioners Court include the authority to make a substantial number of decisions *that affect all* citizens. . . ." *Id.* at 484 (emphasis added). Because each person within the jurisdiction of the commissioners' court was affected by its decision (irrespective of their citizenship or eligibility to vote), equal protection required that each person have "fair and effective" representation in its decision-making. And because the commissioners' court was comprised of single-member districts, fair representation meant

that each commissioner was constitutionally required to represent substantially equal numbers of people residing within "the entire geographic area served by the body." *Id.* at 484-85.

Avery's holding confirms the central holding of *Reynolds*: County commissioners, like legislators, are elected to represent all of the persons in their districts, not only those who happen to be eligible voters. Persons, independently of their citizenship or voting status, are subject to the jurisdiction of their representative governments; persons are affected by the decisions taken; and persons are guaranteed equal protection under the laws enacted. *See Avery*, 390 U.S. at 484. Thus, it is persons that elected officials represent and to whom they are responsive. *Reynolds*, 377 U.S. at 565 (finding that "[s]ince legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will"). To achieve the basic aim of fair and effective representation in the apportionment of single-member districts comprising any governmental entity, equal protection requires equal representation for equal numbers of people – *i.e.*, that each district contain substantially equal number of persons.

Hadley v. Junior College District of Metropolitan Kansas City, 397 U.S. 50 (1970), on which the appellants rely, illustrates an exception that proves the rule of "equal representation for equal numbers of people." In *Hadley*, six trustees of a regional junior college school district were apportioned among eight

separate local school districts based on "the number of persons between the ages of six and 20 years" residing therein, most of whom were not eligible to vote. *Id.* at 51. Although the apportionment was not based on total population, its basis was understandable because children, ages six to twenty, were most directly affected by the decisions of the elected trustees. One of the six separate districts, the Kansas City school district, contained sixty percent of the apportionment base, but was only accorded three trustees. *Id.* at 51-52. On those facts, *Hadley* held that the apportionment scheme violated the Equal Protection Clause: Representation in the governmental unit was allocated disproportionally to those persons most affected by its decisions.

Hadley's holding also confirms the core teaching of *Reynolds* and *Avery*: Equal protection of the laws requires equal representation of the persons subject to law. When a person lives in an overpopulated district, her representative necessarily represents her interests or voice to a lesser degree in law-making than a representative representing other persons residing in an underpopulated district. That is an equal-protection injury; but, it is not an injury that the appellants allege.

II. THE RIGHT TO AN EQUALLY-WEIGHTED VOTE, AS GUARANTEED BY THE EQUAL PROTECTION CLAUSE, DOES NOT REQUIRE THAT STATE LEGISLATIVE DISTRICTS BE REDISTRICTED TO CONTAIN EQUAL NUMBERS OF ELIGIBLE VOTERS.

The appellants see *Wesberry*, *Reynolds*, and their progeny differently, viewing those cases only through the prism of "one person, one vote." The "one person, one vote" principle was first set forth in *Gray v. Sanders*, 372 U.S. at 381. In *Gray*, this Court ruled that the Equal Protection Clause requires that each vote cast in the same election in the same constituency must be of the same weight as every other vote cast in that constituency. *See id.* While this Court has employed "one person, one vote" as a shorthand for other constitutional principles, *see, e.g.*, *Wesberry*, 376 U.S. at 18, in the main, "the rule has been interpreted to mean that 'each person's vote counts as much, insofar as it is practicable as any other person's'" in the same constituency, *Chisom*, 501 U.S. at 402 n.31 (quoting *Hadley*, 397 U.S. at 54).

The appellants suggest that the right to a vote of the same weight uniquely justifies the *Reynolds* Court's opinion. To be sure, there is dicta in *Reynolds* that refers to an elector's right "to have his vote weighted equally with those of all other citizens." 377 U.S. at 576. And *Reynolds* relates its holding to the constitutional protection of the right to vote. There, the Court ambiguously said, "the overriding objective [of legislative apportionment] must be substantial

equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id.* at 579.[2]

The *Burns* Court made use of *Reynolds*'s mention of a right to a vote of the same weight to support its reading that *Reynolds* left open the issue of the population base by which states may apportion their legislative seats. *Burns*, 384 U.S. at 91 n.20. The appellants, however, read *Reynolds*'s dicta for a far stronger conclusion. Going well beyond *Burns*'s reading, the appellants contend that *Reynolds* established that the right to a vote of the same weight requires state legislative districts to contain equal numbers of eligible voters, even if that apportionment results in an unequal apportionment of persons.

Neither conclusion is correct. The Equal Protection Clause guarantees to voters in the *same* constituency the right to cast an equally-weighted vote. As *Gray* and other cases applying the right to a vote of equal weight have clarified, the right presupposes an already-determined constituency. It does not limit how states define the constituencies of their legislatures.

---

[2] "So that" in the *Reynolds* dicta could either be read to mean "and as a result" or "in order to achieve that." *Id.* at 576. Only the former is consistent with the *Reynolds* Court's holding.

A. The Right To A Vote Of The Same Weight Presupposes An Already-Defined Constituency And The Geographical Unit From Which A Representative Is Chosen.

The Equal Protection Clause applies to how votes are cast and counted. Once a State grants the franchise to the electorate, "[it] may not, by later arbitrary and disparate treatment, value one person's vote over that of *another*." *Bush*, 531 U.S. at 104-05 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966)). For instance, a State may not restrict the right to vote by subjecting the voter to an arbitrary or discriminatory classification. *See, e.g.*, *Harper*, 383 U.S. at 665; *Carrington v. Rash*, 380 U.S. 89, 96-97 (1965); *United States v. Mosley*, 238 U.S. 380, 383 (1915). Nor may a State permit a ballot to be cast, but count it differently from other votes cast by members of the same constituency in the same election – either by subjecting the ballot to arbitrarily disparate criteria to determine for whom it is cast, *Bush*, 531 U.S. at 104-05, or by according it lesser weight when tallying the votes to determine a winner, *Gray*, 372 U.S. at 381.

Gray established the right of a qualified voter to cast a vote of equal weight. In *Gray*, this Court considered an equal-protection challenge to Georgia's county-unit system as the method for counting votes in Democratic primaries for the nomination of candidates for statewide offices. Under this system, the votes that ultimately counted were the "unit votes"

assigned to each county, not the votes cast by individual voters. While individual voters within each county determined how the "unit vote" of that county should be cast, it was the "unit vote" of each county, not the popular vote, which determined the outcome of the election. "Unit votes" were not allocated to counties in proportion to their population. As a result, Georgia's county-unit system gave rural voters a disproportionate political influence over statewide primary elections. *Id.* at 379. This Court invalidated Georgia's county-unit system, holding that the Equal Protection Clause guarantees to every qualified elector in a statewide election a right to have her vote counted as having equal weight as every other vote cast in the election. *Id.* at 381.

Gray made clear that the right to cast an equally-weighted vote is constituency-specific: It is held by electors voting in *the same constituency* for candidates competing for the same offices. The *Gray* Court explained that under the Equal Protection Clause, "[o]*nce the geographical unit for which a representative is to be chosen is designated*, all who participate in the election are to have an equal vote . . . wherever their home may be in that geographical unit." *Id.* at 379 (emphasis added); *see also id.* at 381 ("*But once the class of voters is chosen* and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded.") (emphasis added); *id.* at 382 (Stewart, J., concurring) (internal citation omitted) (confirming that "[w]*ithin a given constituency*, there can be room for but a single

constitutional rule – one voter, one vote") (emphasis added). Equal protection requires an elector's vote be counted the same as the votes of other electors of the same constituency, voting in the same election, for the same sets of *candidates* vying for the same offices.

B. Because The Right To A Vote Of The Same Weight Is Constituency-Specific, It Does Not Require That Separate Constituencies Have The Same Number Of Voters.

Thus, the appellants read *Gray* for too much. The right to a vote of equal weight in the same election does not imply that legislative districts must contain equal numbers of voters. The *Gray* Court – the same Court that decided *Reynolds* – said so itself. Noting that the case before it was "only a voting case," not a reapportionment case, the *Gray* Court explained that its holding under the Equal Protection Clause did not address any question about the constitutionality of state legislative apportionments. *See* 372 U.S. at 378 ("Nor does the question here have anything to do with the composition of the state or federal legislature."); *see also id.* at 381-82 (Stewart, J., concurring) ("This case does not involve the validity of a State's apportionment of geographic constituencies from which representatives to the State's legislative assembly are chosen, nor any of the problems under the Equal Protection Clause which such litigation would present."). Further, *Gray* emphasized that the cases on which it relied dealt with the right to vote within a

single constituency. *See id.* at 380 ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several *competing* candidates, underlies many of our decisions.") (emphasis added) (citations omitted).

The guarantee of equal protection undoubtedly informs the determination of the constituencies that comprise single-member districts; however, the Equal Protection Clause performs that work through the right of equal representation. Then, once the constituencies are defined, the "one person, one vote" principle applies: Each vote cast by a member of a constituency must be counted and treated the same as every other vote cast in that constituency. Accordingly, a person who resides in a comparatively overpopulated single-member district suffers an equal-protection injury to her right of equal representation. But, assuming she is a voter, so long as her vote is treated and counted the same as each vote cast for candidates vying to represent that district, she would not suffer an *extra* injury *qua* voter.

Further, even under appellants' conception of their alleged injury, it is not clear how the right to an equally-weighted vote would support an apportionment basis of eligible voters, some of whom may never register or cast a ballot. An eligible voter does not suffer a vote-dilution injury if they are not registered and cannot or do not vote. An injury to the right to an equally-weighted vote presupposes, if nothing else, a vote.

The appellants incorrectly read the cases. Neither in *Gray*, nor in any other case, has this Court applied the right to a vote of the same weight and subject to the same treatment across different constituencies. *Avery*, *Reynolds*, and *Wesberry* applied rights to equal representation. *Bush* and *Gray* applied the right to a vote of the same weight and subject to equal treatment, but not across separate constituencies voting for separate sets of candidates seeking separate offices. In *Bush v. Gore*, for example, voters in Florida did not suffer an equal-protection injury because their ballots were not assessed the same as ballots in other states. Their injury was predicated on the fact that their ballots were being treated differently from the ballots of voters in the same constituency, *i.e.*, Florida electors voting for candidates for President. 531 U.S. at 104-05.

III. NOTHING IN *BURNS V. RICHARDSON* SUGGESTS THAT PLAN S172 VIOLATES THE EQUAL PROTECTION CLAUSE.

Neither the right to equal representation for equal numbers of people nor the right to a vote of the same weight requires that state legislative districts be apportioned on a registered-voter or eligible-voter basis. In other words, neither *Reynolds* nor *Gray* supports the appellants' claim. Sorting through the appellants' arguments, only *Burns v. Richardson* is left as a proposed ground for appellant's novel reading of the Equal Protection Clause.

Burns, however, does not remotely hold that the Equal Protection Clause requires that state legislative districts be apportioned to contain equal numbers of registered or eligible voters. The *Burns* Court reviewed the apportionment of Hawaii's House of Representatives, set forth in Hawaii's Constitution, and an interim legislative plan for the apportionment of Hawaii's Senate, enacted by statute. 384 U.S. at 82-83. The apportionment of both Hawaii's House members and the apportionment of Hawaii's senatorial seats had been based on the number of registered voters. *Id.* at 77, 81. For reasons unrelated to the apportionment base, the district court disapproved of the plan set forth by statute for the apportionment of Hawaii's Senate. On appeal, this Court vacated the district court's order, holding that the statute apportioning the Senate and the extant House apportionment together constituted an interim apportionment plan that did not contravene the requirements of the Equal Protection Clause. *Id.* at 86.

In reaching its holding, the *Burns* Court considered whether an apportionment based on numbers of registered voters is consistent with the guarantees of equal protection. The *Burns* Court noted skepticism, recognizing that apportionments based on the number of registered voters are subject to arbitrariness and abuse. The *Burns* Court found that the use of a registered-voter apportionment base was problematic because "registration figures derived from a single election are made controlling for as long as 10 years" and such figures are subject to "fluctuations . . .

caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions." *Id.* at 93 (internal citation and quotation marks omitted). *Burns* also found that voter-based apportionment creates perverse incentives for legislatures to depress voter registration because of the strategic effect on future legislative apportionment. The *Burns* Court acknowledged that the use of a registered voter or actual voter basis "is . . . susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a 'ghost of prior malapportionment.'" *Id.* at 92-93 (internal citation omitted).

Because of the potential for abuse of an apportionment based on voters, the *Burns* Court held that Hawaii's registered-voter basis for apportionment "satisfie[d] the Equal Protection Clause *only* because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis." *Id.* at 93 (emphasis added); *accord id.* at 98-99 (Harlan, J., concurring in the judgment) ("As I read today's opinion, registered voter figures are an acceptable basis for apportionment *only* so long as they substantially approximate the results that would be reached under some other type of population-based scheme of apportionment.") (emphasis added). For *Burns*, therefore, a total-population basis was still the gold standard. The

Burns Court permitted a deviation from that standard because it found that, according to Hawaii's 1950 constitutional convention report, a registered-voter basis was chosen as a reasonable approximation of a total-population basis, while avoiding the issue that census tracts did not necessarily overlap with traditional local boundaries. *Id.* at 93-94.

Burns also justified a deviation from a total-population basis on the finding that Hawaii's interim use of a voter basis did not raise concerns of arbitrary or invidious discrimination. The *Burns* Court noted that, on the record before it, Hawaii had used a registered-voter basis to discount the large military presence on Oahu, yet had not sought to lock military personnel out of representation in the state legislature by denying them the vote. *Burns* pointed to the district court's finding "that military population of Oahu, and its distribution over that island, was sufficient to explain the already noted differences between total population and registered voters apportionments . . . [and that] no scheme in Hawaii's Constitution or in the statutes implementing the exercise of franchise . . . [was] aimed at disenfranchising the military or any other group of citizens." *Id.* at 95 (internal citation and quotation marks omitted). Significantly, the *Burns* Court also recalled the district court's finding that because "Hawaii's Constitution and laws actively encourage voter registration . . . [a] high proportion of the possible voting population is registered." *Id.* at 96 (internal citation and quotation marks omitted).

The *Burns* Court, therefore, found that Hawaii's registered-voter basis produced a districting plan that was not very different from the plan that would have been produced using a total-population base. And, where those two apportionment bases created disparities, *Burns* found that those differences were not intended to lock a particular group out of representation in Hawaii's legislature. On those facts, *Burns* held that, "with a view to its interim use, Hawaii's registered voter basis does not on this record fall short of constitutional standards." *Id.* at 97. This is a narrow holding.

Under *Burns*, a registered-voter apportionment base is neither required by, nor always permissible under, the Equal Protection Clause. As the *Burns* Court explicitly said, "We are not to be understood as deciding that the validity of the registered voter basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere." *Id.* at 96. Yet, following Judge Kozinski's dissent *dubitante* in *Garza*, the appellants suggest the contrary. *Garza v. County of Los Angeles*, 918 F.2d 763, 784 (9th Cir. 1990) (Kozinski, J., dissenting). For the appellants, as for Judge Kozinski's *Garza* dissent, *Burns* can only be explained as an application of the principle of "electoral equality" – *viz.*, that state legislative districts must contain equal numbers of voters. Not so. The *Burns* Court explained its decision, not as a new rule, but as an *exception* to the use of a total-population basis made permissible because, first, Hawaii's apportionment approximated the result that would have

been achieved by the use of total population and, second, the record indicated that Hawaii's use of a registered-voter basis would not frustrate any group's representation in the state legislature. Nor did Hawaii adopt a voter basis to achieve "electoral equality." Rather, as *Burns*'s review of the record shows, Hawaii adopted a voter basis because the means to establish total population presented problems novel to Hawaii: The census tracts were not faithful to traditional boundaries in Hawaii, and the census included persons who were not fairly considered as part of the total population. *Burns* allowed Hawaii to depart from a total-population basis, but not because this Court rejected that basis in principle.

In contrast to the appellant's reading, the logic of *Burns* is consistent with *Reynolds*'s holding that the Equal Protection Clause requires that single-member state legislative districts be apportioned to contain equal numbers of persons. *Burns* permits the use of a non-total-population apportionment basis, but only so long as it approximates the results achieved by an apportionment according to total population and does not work to frustrate the representation of a particular group. Such limiting conditions mean that the Equal Protection Clause does not always permit a scheme by which state legislative districts are apportioned to contain equal numbers of registered voters; *a fortiori*, it does not require it.

It follows that *Burns* is unavailing for the appellants.

IV. THIS COURT SHOULD NOT HOLD THAT THE APPELLANTS HAVE STATED AN EQUAL-PROTECTION CLAIM.

The appellants have not stated a claim under the Equal Protection Clause. Consistent with the holding of *Reynolds*, Texas, like every other state, elected not to use voter registration or eligible-voter estimates as its apportionment base for seats in the Texas Senate. Plan S172 creates senate districts containing roughly equal numbers of persons and, therefore, does not infringe the appellant's right to equal representation. Nor does Plan S172 violate the principle of "one person, one vote." Plan S172 does not unequally count or disparately treat the votes cast in any given constituency for candidates vying for the same seat in the Texas Senate. Accordingly, Plan S172 violates no right that equal protection guarantees to the appellants.

For additional reasons, this Court should not hold that the Equal Protection Clause requires that state legislative districts be redistricted to contain equal numbers of registered or eligible voters. First, such a holding would mean that the legislatures of every state are unconstitutionally districted, requiring redistricting on a voter basis, which, as *Burns* found, would be subject to arbitrariness and abuse.

Second, such a holding would create an "indefensible tension" in which states are *required* by Article I, Section 2 of the Constitution to use total population as the basis for the drawing of congressional districts,

but are *prohibited* by the Equal Protection Clause from using the same standard when redistricting state legislative districts. Brief for the United States, at 6, *County of Los Angeles v. Garza*, 498 U.S. 1028 (1991) (No. 90-849) (denying certiorari). The appellants offer no convincing reason why the seats of the national legislature must be redistricted to contain equal numbers of persons, but that, in some cases, the seats of state legislatures must not be. There is none.

Finally, the appellants advocate for an interpretation of the Equal Protection Clause that would jettison the equal representation of persons in state legislatures. A ruling in their favor would break the link between the right of every *person* to equal protection under the laws enacted by the state legislature and the right of every *person* subject to those laws to equal representation in that legislature. The constitutional guarantee to all persons of the equal protection of the laws is achieved, in the main, by equal representation in the legislative bodies that enact the laws under which they are subject. This Court should refrain from pulling down that constitutional structure.

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted,

EMMET J. BONDURANT
Counsel of Record
JEREMY D. FARRIS
BONDURANT, MIXSON & ELMORE, LLP
3900 One Atlantic Center
1201 W. Peachtree Street
Atlanta, Georgia 30309
Bondurant@bmelaw.com
(404) 881-4100

Counsel for Common Cause

No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
DAVID H. GANS
BRIANNE J. GOROD
CONSTITUTIONAL ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

September 25, 2015

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. THE CONSTITUTUTION'S FOUNDERS ESTABLISHED TOTAL POPULATION AS THE STANDARD FOR APPORTIONING REPRESENTATIVES TO CONGRESS IN ORDER TO GUARANTEE EQUAL REPRESENTATION FOR EQUAL NUMBERS OF PEOPLE	4
II. THE FOURTEENTH AMENDMENT REAFFIRMED THE TOTAL POPULATION STANDARD IN ORDER TO ENSURE EQUAL REPRESENTATION FOR EQUAL NUMBERS OF PEOPLE	10
III. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT STRIP NONCITIZENS AND OTHER PERSONS WHO LACK THE VOTE OF EQUAL REPRESENTATION IN STATE LEGISLATURES	19
IV. THIS COURT'S ONE-PERSON, ONE-VOTE CASES CORRECTLY USE TOTAL POPULATION AS THE BENCHMARK FOR JUDGING THE CONSTITUTIONALITY OF FEDERAL AND STATE LEGISLATIVE DISTRICTING	21
CONCLUSION	27

TABLE OF AUTHORITIES

Page(s)

Cases

Bd. of Estimate of New York v. Morris,
489 U.S. 688 (1989) 22

Brown v. Thomson,
462 U.S. 835 (1983) 24

Burns v. Richardson,
384 U.S. 73 (1966) 26

Connor v. Finch,
431 U.S. 407 (1977) 24

Daly v. Hunt,
93 F.3d 1212 (4th Cir. 1996) 25

Gaffney v. Cummings,
412 U.S. 735 (1973) 24, 25, 26

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1990) 6

Karcher v. Daggett,
462 U.S. 725 (1983) 22

Kirkpatrick v. Preisler,
394 U.S. 526 (1969) 3, 22

Mahan v. Howell,
410 U.S. 315 (1973) 3, 22, 24, 26

Plyler v. Doe,
457 U.S. 202 (1982) 19

Reynolds v. Sims,
377 U.S. 533 (1964) 3, 23, 24, 25

TABLE OF AUTHORITIES – cont'd.

Page(s)

The Civil Rights Cases,
109 U.S. 3 (1883) 19

Wesberry v. Sanders,
376 U.S. 1 (1964) 3, 22

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 19

Constitutional Provisions and Legislative Materials

Cong. Globe, 39th Cong., 1st Sess.
(1865) 12

Cong. Globe, 39th Cong., 1st Sess.
(1866) ..... passim

Cong. Globe, 41st Cong., 2nd Sess.
(1870) 21

Enforcement Act of 1870, 16 Stat. 140 20

Pa. Const. of 1776, §17 7

The Declaration of Independence para. 5
(U.S. 1776) 6

U.S. Const. art. I, §2 ..... 2, 5

U.S. Const. amend. XIV 2, 10, 19

Books, Articles, and Other Authorities

1 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1911) ..... passim

2 *The Records of the Federal Convention of 1787* (Max Farrand ed., 1911) 5, 9

TABLE OF AUTHORITIES – cont'd.

Page(s)

4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Jonathan Elliot ed., 1836)..... 4

Akhil Reed Amar, *America's Constitution: A Biography* (2005) 8, 9

Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction 39th Congress, 1865-1867* (1914) 13

Gordon S. Wood, *The Creation of the American Republic 1776-1787* (1969)..... 6, 7

Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996) 6

John Adams, *Thoughts on Government* (1776), *in The Political Writings of John Adams* 83 (George A. Peek, Jr. ed., 1954). 6

Report of the Joint Committee on Reconstruction at the First Session Thirty-Ninth Congress (1866). 12

The Federalist No. 54 (James Madison) (Clinton Rossiter ed., 1961) 5, 7

INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in this case and the scope of the protections of the Fourteenth Amendment.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2013, the Texas legislature enacted into law a redistricting plan for the State Senate, drawing thirty-one districts containing substantially equal numbers of individuals. Using total population data gathered in conducting the U.S. Census, Texas's State Senate districting plan—like plans enacted by states across the nation—ensured equal representation for all persons. Evenwel, however, contends that a state violates the Equal Protection Clause of the Fourteenth Amendment when it draws districts that contain substantially equal numbers of persons if those districts do not also contain approximately the same number of eligible voters. According to Even-

---

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

wel, "the 'population' States must equalize for one-person, one-vote purposes is the population of eligible voters." Appellants' Br. at 15. In other words, only a subset of the population counts in the one-person, one-vote calculus. That radical claim—which has never been accepted by any court—cannot be squared with the Constitution's text and history.

Both at the Founding and following the Civil War, our Constitution's Framers debated how to ensure a system of equal representation consistent with our Constitution's promise of individual rights and democratic self-governance. On both occasions, our Constitution's Framers decreed that representation in the House of Representatives would be based on the total population, not the number of eligible voters or other less-encompassing metrics. *See* U.S. Const. art. I, §2; *id.* at amend. XIV, § 2. During the debates over the Fourteenth Amendment, many Congressmen urged—as Evenwel does here—that the number of eligible voters should be the basis of representation, insisting that voter equality must be the overriding constitutional concern. Those arguments were rejected time and again. The Framers decreed that "the whole population is represented; that although all do not vote, yet all are heard. That is the idea of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 705 (1866). As Senator Jacob Howard, one of the chief authors of the Fourteenth Amendment, explained, "[n]umbers, not voters; numbers, not property; this is the theory of the Constitution." *Id.* at 2767. In Article I, § 2 and in the Fourteenth Amendment, the Framers established a fundamental principle about representation that is at the core of the one-person, one-vote rule. Evenwel's argument wrongly rejects as irrelevant this fundamental premise underlying the Constitution's provisions concerning representation.

Consistent with the Constitution's text and history, this Court's one-person, one-vote cases have repeatedly affirmed "our Constitution's plain objective" of ensuring "equal representation for equal numbers of people." *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964). Holding that Article I, Section 2 and the Fourteenth Amendment require states to draw district lines for the House of Representatives and for state legislatures "on a population basis," *Reynolds v. Sims*, 377 U.S. 533, 576 (1964), this Court recognized that a population basis is necessary to "prevent debasement of voting power and diminution of access to elected representatives." *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). While the standards applicable to congressional and state legislative districting vary, *see, e.g.*, *Mahan v. Howell*, 410 U.S. 315, 322 (1973), both lines of cases derive from the fact that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." *Reynolds*, 377 U.S. at 560-61. Under this Court's cases, total population is the benchmark for assessing a one-person, one-vote claim.

Evenwel insists that she can disregard what the Constitution says about representation, as well as this Court's repeated holdings using total population as the benchmark, because the Equal Protection Clause of the Fourteenth Amendment demands a focus on voter, not population, equality. But the Fourteenth Amendment's sweeping guarantee of equality protects all persons, not merely voters. Indeed, the Equal Protection Clause contained in Section 1 of the Fourteenth Amendment mirrors the guarantee of equal representation contained in Section 2, securing equal treatment to citizen and noncitizen alike. Both

Section 1's Equal Protection Clause and Section 2's mandate that representation be based on total population recognize that "[a]ll the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government." Cong. Globe, 39th Cong., 1st Sess. 2962 (1866). The Equal Protection Clause is not a license to strip noncitizens and others who lack access to the ballot of equal representation in state legislatures.

When a state draws legislative districts composed of substantially equal numbers of persons, it ensures equal representation for all persons and thereby acts in accord with—not contrary to—the constitutional guarantee of equal protection of the laws for all persons. Evenwel's argument cannot be squared either with the plain terms of the equal protection guarantee or the Constitution's provisions explicitly concerning representation.

ARGUMENT

I. THE CONSTITUTUTION'S FOUNDERS ESTABLISHED TOTAL POPULATION AS THE STANDARD FOR APPORTIONING REPRESENTATIVES TO CONGRESS IN ORDER TO GUARANTEE EQUAL REPRESENTATION FOR EQUAL NUMBERS OF PEOPLE.

In order to ensure that "the foundations of this government should be laid on the broad basis of the people," 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 21 (Jonathan Elliot ed., 1836), Article I, Section 2 provides that the "House of Representatives shall be composed of Members chosen every second Year by

the People of the several States" and that "[r]epresentatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, . . . and excluding Indians not taxed, three fifths of all other Persons." U.S. Const. art. I, § 2, cl. 1, 3. To ensure a proper count of the nation's total population, Article I requires an "actual Enumeration" of the people of the nation. *Id.* at cl. 3.

In choosing the total population standard, our Constitution's eighteenth-century Framers decreed "that as all authority was derived from the people, equal numbers of people ought to have an equal no. of representatives." 1 *The Records of the Federal Convention of 1787*, at 179 (Max Farrand ed., 1911) [hereinafter *Farrand's Records*] (James Wilson). While the Senate was ultimately designed to represent the several States, the House of Representatives would be "the grand depository of the democratic principle of the Govt." and "ought to know & sympathise with every part of the community," *id.* at 48 (James Mason), serving as "the most exact transcript of the whole Society." *Id.* at 132 (James Wilson). As Madison observed, "the Representatives of the people ought to be in proportion to the people." 2 *id.* at 8.

Article I, Section 2's requirement that members of Congress be chosen by the people from districts "founded on the aggregate number of inhabitants," *The Federalist No. 54*, at 306 (James Madison) (Clinton Rossiter ed., 1961), included both citizens who enjoyed the right to vote as well as those who lacked access to the ballot. "The framers were aware that this apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants, convicts, the

insane, and, at a later time, aliens. Nevertheless, they declared that government should represent *all* the people." *Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990).

Ensuring representation for all had deep roots in America's bid for independence from England. The Framers were familiar with what James Madison called the "vicious representation in G. B.," 1 *Farrand's Records*, *supra*, at 464, in which "so many members were elected by a handful of easily managed voters in 'pocket' and 'rotten' boroughs, while populous towns went grossly underrepresented or not represented at all[.]" Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 210 (1996). In 1767, the King's Privy Council prevented colonial assemblies from adding seats to take account of population growth, prompting the Declaration of Independence's charge that the King had refused to "accommodat[e] . . . large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only." The Declaration of Independence para. 5 (U.S. 1776). The colonists that revolted from England understood that "equal representation," as John Adams observed, meant that "equal interests among the people should have equal interests in it." John Adams, *Thoughts on Government* (1776), *in The Political Writings of John Adams* 83, 86 (George A. Peek, Jr. ed., 1954). "More than anything else, this equality would prevent the 'unfair, partial, and corrupt elections' and the 'monstrous irregularity' of the English representational system . . . ." Gordon S. Wood, *The Creation of the American Republic 1776-1787*, at 170 (1969).

A number of Revolution-era State Constitutions incorporated the principle of equal representation

based on an actual count of the people. For example, the Pennsylvania Constitution of 1776 provided that "representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty, and make the voice of a majority of the people the law of the land" and required the legislature to conduct a census every seven years and to allocate seats "in proportion to the number of taxables." Pa. Const. of 1776, §17; *see also* Wood, *supra*, at 171-72 (discussing early state constitutions). In writing the Constitution to guarantee equal representation for equal numbers of people based on an actual count of the people, the Framers worked off of these earlier state constitutions.

During the debates over Article I's representation provisions, the Framers explained that the total population standard reflected that "every individual of the community at large has an equal right to the protection of government." 1 *Farrand's Records*, *supra*, at 473 (Alexander Hamilton); *id.* at 477 ("[T]he people shd. be repre[se]nted in proportion to yr. numbers, the people then will be free." (Alexander Hamilton)). As James Madison explained, the total population standard "is understood to refer to the personal rights of the people, with which it has a natural and universal connection." *The Federalist No. 54*, *supra*, at 304.

Over the course of the Convention, the Framers rejected other, more-restrictive provisions for apportioning representatives in favor of a rule counting all individuals. During the debates over Article I, § 2, Pierce Butler urged a rule of representation based on wealth or property, claiming that "property was the only just measure of representation" and the "great object of Governt." 1 *Farrand's Records*, *supra*, at 542. Others agreed that "ye. number of inhabitants was not the proper index of ability & wealth; that

property was the primary object of Society" and urged that "in fixing a ratio this ought not to be excluded from the estimate." *Id.* at 541 (Rufus King). These proposals to depart from the rule of equal representation for equal numbers of people were overwhelmingly rejected, and the government was "thus . . . prevented from openly basing apportionment on wealth, or devising some other sly formula to entrench themselves against demographic shifts in the outside world." Akhil Reed Amar, *America's Constitution: A Biography* 84 (2005).

The Framers overwhelmingly concluded that "[t]he number of inhabitants" was the "only just & practicable rule," determining that a wealth-based standard of representation "must be too changeable" and "too difficult to be adjusted." 1 *Farrand's Records*, *supra*, at 542 (Charles Pinckney); *see also id.* at 587 (urging "propriety of establishing numbers as the rule" (Nathaniel Ghorum)); *cf. id.* at 593 (arguing that "ye. number of people ought to be established as the rule" since "population" was "the best measure of wealth" (William Johnson)). James Wilson denied that "property was the sole or the primary object of Govrnt. & Society. The cultivation & improvement of the human mind was the most noble object. With respect to this object, as well as to other *personal* rights, numbers were surely the natural & precise measure of Representation." *Id.* at 605. Further, he pointed out, "if numbers be not a proper rule, why is not some better rule pointed out. No one has yet ventured to attempt it. Congs. have never been able to discover a better. No State . . . has suggested any other." *Id.* Immediately following Wilson's speech, the Convention unanimously voted to strike out proposed language that would have permitted representation to be based on wealth. *Id.* at 606.

Article I's rule that representatives would be apportioned based on an "actual Enumeration" of the "respective Numbers" of people—designed to guarantee equal representation for equal numbers of people—however, was undercut by the Three-Fifths Clause, which guaranteed to the slaveholding states additional representation in Congress based on the number of slaves held in bondage. "The more slaves the Deep South could import from the African continent—innocents born in freedom and kidnapped across an ocean to be sold on auction blocks—the more seats it would earn in the American Congress." Amar, *supra*, at 90.

During the debates in the Convention, Gouverneur Morris and others argued strenuously against the adoption of the Three-Fifths Clause, pointedly asking "[u]pon what principle is it that the slaves shall be computed in the representation? Are they men? Then make them Citizens & let them vote? Are they property? Why then is no other property included?" 2 *Farrand's Records*, *supra*, at 222 (Gouverneur Morris). Opponents of the Clause argued that Southern states should not have their representation increased on account of the slave population since slaves are "no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, & like other property entirely at the will of the Master." 1 *Farrand's Records*, *supra*, at 561 (William Patterson). The upshot of the Clause, Morris charged, was that "the inhabitant of Georgia and S. C. who goes to the coast of Africa, and . . . tears away his fellow creatures from their dearest connections & dam(n)s them to the most cruel bondages, shall have more votes in a Govt. instituted for protection of the rights of mankind." 2 *Farrand's Records*, *supra*, at 222. Despite these arguments, the

Convention approved the Three-Fifths Clause as a compromise necessary to ensure the Constitution's ratification.

Nearly 80 years later, following a bloody Civil War fought over slavery, the Framers of the Fourteenth Amendment revisited the Constitution's system of representation in the wake of the abolition of slavery, which rendered the Three-Fifths Clause a nullity. The next section examines the text and history of the Fourteenth Amendment.

II. THE FOURTEENTH AMENDMENT REAFFIRMED THE TOTAL POPULATION STANDARD IN ORDER TO ENSURE EQUAL REPRESENTATION FOR EQUAL NUMBERS OF PEOPLE.

Reaffirming the Founding-generation's commitment to equal representation for equal numbers of people, Section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." U.S. Const. amend. XIV, § 2. To redress racial discriminating in voting by state governments, Section Two further provides a penalty of reduced congressional representation "when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States." *Id.*

The Fourteenth Amendment's guarantee of equal representation for equal numbers of people emerged

after seven months of heated debate over the Constitution's promise of equal representation for all. Over the course of the 39th Congress, the Framers of the Fourteenth Amendment debated whether to base representation on total population or on the number of voters, with many members of Congress introducing proposals to change the basis of representation from total population to voter population. Following these lengthy debates, the Framers reaffirmed total population as the Constitution's basis for representation. As Jacob Howard explained in introducing the Fourteenth Amendment, "numbers," i.e., total population, is "the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers; and such . . . is the safest and most secure principle upon which the Government can rest. Numbers, not voters; numbers, not property; this is the theory of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2767 (1866).

A comprehensive review of these debates demonstrates that Evenwel's claim that states must draw districts composed of equal numbers of voters finds no basis in the Fourteenth Amendment's text and history. In fact, the Framers of the Fourteenth Amendment considered and rejected Evenwel's voter-equality theory of representation in favor of ensuring equal representation for an equal number of persons.

When the 39th Congress met in December 1865, questions of representation were front and center. With the Three-Fifths Clause a nullity, the Framers of the Fourteenth Amendment were concerned that the newly freed slaves would now be counted as full persons, giving the Southern states far more representation in Congress and in the Electoral College than they had before they had seceded from the Un-

ion. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 357 (1866) ("Shall the death of slavery add two fifths to the entire power which slavery had when slavery was living?"). As the Joint Committee on Reconstruction, which was tasked with writing the Fourteenth Amendment, explained, "[t]he increase of representation necessarily resulting from the abolition of slavery was considered the most important element in the questions arising out of the changed condition of affairs, and the necessity for some fundamental action in this regard seemed imperative." *Report of the Joint Committee on Reconstruction at the First Session Thirty-Ninth Congress* xiii (1866).

Even before the Joint Committee began its work, members of Congress proposed constitutional amendments aimed at changing the Constitution's basis of representation. On December 5, 1865, Rep. Thaddeus Stevens introduced an amendment, which provided that "[r]epresentatives shall be apportioned among the States . . . according to their respective legal voters" and required Congress to provide a "true census of the legal voters." Cong. Globe, 39th Cong., 1st Sess. 10 (1865). Stevens's proposed amendment, as well as other similar proposals, met fierce objection. On January 8, 1866, Rep. James Blaine explained that "population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot." *Id.* at 141 (1866). Stripping non-voters of their right to representation guaranteed by the Constitution, Blaine argued, would lead to "gross inequalities of representation" in "the loyal States." *Id.* Rather than changing the Constitution's system of representation, Blaine preferred a targeted amendment

reducing congressional representation in states that denied the right to vote on account of race.

On the following day, January 9, the Joint Committee convened to consider proposed constitutional amendments. Rep. Stevens immediately proposed the same amendment he had proposed in the House. See Benjamin B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction 39th Congress, 1865-1867*, at 41 (1914). Several days later, the Committee, by a vote of 8-6, voted down a resolution that proposed that "representatives should be apportioned among the several States according to their respective numbers of legal voters." *Id.* at 45. On January 16, the Joint Committee approved a constitutional amendment that reaffirmed Article I's mandate that representation be apportioned "according to their respective numbers, counting the whole numbers of persons in each State, excluding Indians not taxed" and added a proviso that "whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons of such race or color shall be excluded from the basis of representation." *Id.* at 51-52, 53. Although the amendment initially provided for basing representation on the "whole number of citizens of the United States in each State," *id.* at 50, the Joint Committee overwhelmingly voted to change this language to conform to the Constitution's language requiring counting of all persons, citizens and non-citizens alike. *Id.* at 52; *see also* Cong. Globe, 39th Cong., 1st Sess. 359 (1866) (explaining Committee's amendment from counting "citizens" to counting "persons" because "'[p]ersons,' and not 'citizens,' have always constituted the basis" (Rep. Roscoe Conkling)).

When the Joint Committee's amendment was debated before the House, many objected to basing rep-

resentation on total population, making arguments similar to those made here by Evenwel. Rep. Godlove Orth insisted that "the true principle of representation in Congress is that voters alone should form the basis, and that each voter should have equal political weight in our Government." *Id.* at 380; *see also id.* at 379 (insisting that "those who are authorized to vote, who elect Representatives to this House, and they alone, shall constitute the basis of representation" (Rep. Ithamar Sloan)); *id.* at 404 (urging an amendment that "representation shall be based on citizens of the United States who may be male adult voters" so that "every voter should be equal in political power all over the Union" (Rep. William Lawrence)). These views were decisively rejected. Proponents of the amendment in the House argued that such a change in our Constitution's system of representation would be "an abandonment of one of the oldest and safest landmarks of the Constitution" and would "introduce[] a new principle in our Government, whose evil tendancy and results no man can measure to-day." *Id.* at 377 (Rep. James Blaine). Instead, the Reconstruction Framers insisted on "leav[ing] the primary basis of representation where it was placed by our fathers, the whole body of the people." *Id.* at 385 (Rep. Elihu Baker).

Elaborating on why the basis of representation should remain total population, Rep. John Bingham argued that it would be unwise to "strike from the basis of representation the entire immigrant population not naturalized," observing that "[u]nder the Constitution as it now is and as it always has been, the entire immigrant population of this country is included in the basis of representation." *Id.* at 432. In his view, the "whole immigrant population should be numbered with the people and counted as part of

them." *Id.*; *see also id.* at 411 (arguing that representation based on number of voters "takes from the basis of representation all unnaturalized foreigners" (Rep. Burton Cook)). In addition, Rep. Roscoe Conkling emphasized that counting only voters in determining representation "would shut out four fifths of the citizens of the country—women and children, who are citizens, who are taxed, and who are, and always have been, represented," *id.* at 358, resulting in some regions of the country receiving more representation than others. *Id.* at 411 (observing that "the voters of the country are unequally distributed" (Rep. Burton Cook)); *see also id.* at 434 ("[W]hat becomes of that large class of non-voting tax-payers that are found in every section? Are they in no manner to be represented? They certainly should be enumerated in making up the whole number of those entitled to a representative." (Rep. Hamilton Ward)).

Other members in the House argued that changing the basis of representation to voters would inevitably lead to errors, emphasizing that "[i]t is difficult to enumerate voters accurately," *id.* at 411 (Rep. Burton Cook), and that "it would be utterly impossible for the census-taker to ascertain the exact number of those really entitled to the right of suffrage; and thus the injustice of the proposition is still further aggravated." *Id.* at 536 (Rep. John Benjamin).

On January 31, 1866, the House of Representatives approved the amendment by a vote of 120-46, and sent the measure to the Senate. Debate in the Senate, as it had in the House, focused considerably on the question whether the Constitution's system of representation should be based on total population or on voting population. Supporters of the amendment urged that representation should be based "on the largest basis of population, counting every man,

woman, and child," *id.* at 1280, explaining that "[t]he principle of the Constitution, . . . is that it shall be founded on population; that the people who are voters, . . . are not the whole people of a State; . . . . [W]e are attached to that idea, that the whole population is represented; that although all do not vote, yet all are heard. That is the idea of the Constitution." *Id.* at 705 (Sen. William Fessenden). The amendment's proponents refused to "throw[] out of the basis at least two and a half millions of unnaturalized foreign-born men and women," *id.* at 1256 (Sen. Henry Wilson), insisting that "[a] community may be represented, every man in the community may be represented, and every woman and child in the community may be represented, and yet not every man twenty-one years of age be a voter." *Id.* at 1279-80 (Sen. William Fessenden). As in the House, opponents of the amendment urged a change to a voter basis of representation, claiming that the "representative system is the agent of legal voters." *Id.* at 1229 (Sen. Charles Sumner). Ultimately, for other reasons, the amendment failed to garner a 2/3 super-majority. On March 9, 1866, a number of Radical Republicans, led by Senator Charles Sumner, joined with Democrats to prevent approval of the Amendment.

In April 1866, the Joint Committee approved and sent to Congress a new proposed amendment—which would become the Fourteenth Amendment—containing provisions guaranteeing individual rights and rules for apportioning representation in Congress. This new amendment reaffirmed total population as the basis for representation and added a penalty provision reducing representation in states that denied African Americans the right to vote. With this round of debates, only the Senate engaged in extended discussion of the Constitution's system of repre-

sentation. The House, which had lengthy debates on total population as the Constitution's basis of representation only months earlier, did not debate these matters again.

In the Senate debates, Senator Jacob Howard explained that the Fourteenth Amendment's "basis of representation is numbers, whether the numbers be white or black," *id.* at 2766, calling representation in accordance with total population "the only true, practical, and safe republican principle." *Id.* at 2767. Explaining the penalty provision, Howard observed that "[f]ormerly under the Constitution, while the free States were represented only according to their respective numbers of men, women, and children, . . . the slave States had the advantage of being represented according to their number of the same free classes, increased by three-fifths of the slaves whom they treated not as men but as property." *Id.* at 2766. The Amendment's penalty provision ensured that the former slave states could not "persist in refusing suffrage to the colored race," *id.* at 2767, while claiming extra representation because "they have lost the property which they once possessed, and which served as a basis in great part of their representation." *Id.* at 2766.

Opponents of the Fourteenth Amendment urged that only "the voting population of the country should be represented," insisting on a change in the Constitution's system of representation so that "voters should have an equal voice." *Id.* at 2942, 2944 (Sen. James Doolittle). The Framers of the Fourteenth Amendment rejected such efforts to eliminate the Constitution's guarantee of equal representation for equal numbers of people. As Senator Luke Poland argued, the Constitution's "existing basis is the only true one, the only one consistent with the true idea of

a representative republican government. . . . All the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government." *Id.* at 2962; *see also id.* at 2987 (describing proposal to change basis of representation from total population to voting population as "a blow which strikes the two million one hundred thousand unnaturalized foreigners who are now counted in the basis of representation from that basis"). By a 31-7 vote, Senator Doolittle's proposals to base representation on the number of voters were rejected. *Id.* at 2986, 2991.

As these debates reflect, the Fourteenth Amendment featured a great debate over the nature of representation. Following more than seven months of debate in Congress, Congress adopted the Fourteenth Amendment, insisting that total population, not voter population, was the basis for our Constitution's system of representation. The Fourteenth Amendment, which was approved by the people and became a part of the Constitution in 1868, reaffirmed that our Constitution's system of equal representation for all depends on a count of the nation's entire population, including not only citizens, but also non-citizens and others without access to the ballot. The Framers of the Fourteenth Amendment rejected the argument of those—like Evenwel here—who insisted that voter equality demands a counting of the nation's voting population, not its broader population.

Evenwel's argument depends on willful blindness to these basic facts of Fourteenth Amendment history. As these lengthy debates make clear, the Fourteenth Amendment reaffirmed our Constitution's promise of equal representation for equal numbers of people, ensuring that representation in Congress

would be based on total population, not the numbers of voters in a state. Evenwel's argument would tear this Court's one-person, one-vote cases from their mooring in the Constitution on the basis of a system of representation specifically rejected by the Framers of the Fourteenth Amendment.

III. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT STRIP NONCITIZENS AND OTHER PERSONS WHO LACK THE VOTE OF EQUAL REPRESENTATION IN STATE LEGISLATURES.

Evenwel insists that the Constitution's explicit provisions guaranteeing equal representation for equal numbers of people are irrelevant to the question presented here because the Equal Protection Clause of the Fourteenth Amendment requires a focus on voter, not population, equality. Evenwel's argument, here too, cannot be squared with the Fourteenth Amendment's text and history.

The Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws," U.S. Const. amend. XIV, § 1, protects all persons, not merely voters. *See Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ."); *The Civil Rights Cases*, 109 U.S. 3, 24 (1883) ("The Fourteenth Amendment extends its protection to races and classes, and prohibits any State legislation which has the effect of denying to any race or class, or to any individual, the equal protection of the laws."); *see also Plyler v. Doe*, 457 U.S. 202, 212 (1982) ("The Fourteenth Amendment . . . is not con-

fined to the protection of citizens"). As Senator Howard explained, the Amendment's text "disable[s] a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of . . . the equal protection of the laws of the State." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

Like the total population standard for representation codified in Section 2 of the Amendment, Section 1's Equal Protection Clause guarantees equality for the total population residing in a state, including the noncitizens whom Evenwel seeks to strip of equal representation. The Framers recognized that immigrants, who faced pervasive discrimination in the Western United States, needed the protection of equal laws as well.

Congressman John Bingham, one of those responsible for drafting the Fourteenth Amendment, demanded that "all persons, whether citizens or strangers, within this land, . . . have equal protection in every State in this Union in the rights of life and liberty and property." Cong. Globe, 39th Cong., 1st Sess. 1090 (1866). Indeed, in 1870, two years after the Fourteenth Amendment's ratification, Congress used its express constitutional power to enforce the Amendment's guarantee of equality under the law to all persons by passing the Enforcement Act of 1870. This Act secured to "all persons within the jurisdiction of the United States" the "same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens," and protected against the "deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien." Enforcement Act of

1870, 16 Stat. 140, 144; Cong. Globe, 41st Cong., 2nd Sess. 3658 (1870) ("[W]e will protect Chinese aliens or any other aliens whom we allow to come here, . . . ; let them be protected by all the laws and the same laws that other men are."); *id.* at 3871 (observing that "immigrants" were "persons within the express words" of the Fourteenth Amendment "entitled to the equal protection of the laws").

In this respect, Section 1's guarantee of equal population and Section 2's guarantee of equal representation for equal numbers of people are joined at the hip, each protecting citizens and noncitizens alike. Indeed, when the Framers explained the total population rule for representation in Congress, their reasoning sounded in basic notions of equality that are reflected in the Equal Protection Clause. "All the people, or all the members of a State or community, are equally entitled to protection; they are all subject to its laws; they must all share its burdens, and they are all interested in its legislation and government." Cong. Globe, 39th Cong., 1st Sess. 2962 (1866); *see also id.* at 141 (explaining that "women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot"). Evenwel's argument misses this essential feature of the Fourteenth Amendment's guarantees of equal representation and equal protection.

IV. THIS COURT'S ONE-PERSON, ONE-VOTE CASES CORRECTLY USE TOTAL POPULATION AS THE BENCHMARK FOR JUDGING THE CONSTITUTIONALITY OF FEDERAL AND STATE LEGISLATIVE DISTRICTING.

Consistent with the Constitution's text and history, this Court's one-person, one-vote cases use total

population as the benchmark, interpreting both Article I, Section 2 and the Fourteenth Amendment to guarantee equal representation for equal numbers of persons. A review of this Court's precedent demonstrates that the one-person, one-vote rule ensures "population equality between electoral districts," by requiring that "seats in legislative bodies be apportioned to districts of substantially equal populations." *Bd. of Estimate of New York v. Morris*, 489 U.S. 688, 693, 694 (1989); *see also Mahan*, 410 U.S. at 321 (describing the "basic constitutional principle" as "equality of population among districts").

In *Wesberry*, this Court first struck down a state statute that prescribed malapportioned congressional districts as a violation of the one-person, one-vote command. Setting out at length the history that led the Framers to insist on apportioning representation on the basis of total population, the *Wesberry* Court held that "[w]hile it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives." 376 U.S. at 18; *Kirkpatrick*, 394 U.S. at 531 ("[T]he command of Art. I, s 2, that States create congressional districts which provide equal representation for equal numbers of people permits only limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."); *Karcher v. Daggett*, 462 U.S. 725, 732 (1983) (requiring that "absolute population equality" be "the paramount objective" in congressional districting).

Several months after the Court's decision in *Wesberry*, this Court in *Reynolds v. Sims* held that the Equal Protection Clause of the Fourteenth Amend-

ment required states to abide by the constitutional command of one-person, one-vote. Observing that "*Wesberry* clearly established that the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State," Chief Justice Warren's opinion in *Reynolds* asked "whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures." 377 U.S. at 560-61. *Reynolds* concluded that, notwithstanding the differences between Article I, Section 2 and the Equal Protection Clause of the Fourteenth Amendment, "the basic principle of representative government remains, and must remain, unchanged—the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." *Id.* at 567. Accordingly, *Reynolds* held that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable." *Id.* at 577.[2]

---

[2] Evenwel makes much of the language in *Reynolds* that speaks of the rights of voters, Appellants' Br. at 14, 24-26, hoping to fashion the Court's loose language into a holding that the Constitution requires states to draw districts containing an equal number of voters. No court has ever accepted that reading of *Reynolds*, and for good reason. The language of *Reynolds*'s holding that "the seats in both houses of a bicameral state legislature must be apportioned on a population basis," 377 U.S. at 568, and its heavy reliance of Article I, Section 2, as construed in *Wesberry*, make clear that the "basic constitutional principle" is "equality of population among districts." *Mahan*, 410 U.S. at

Consistent with the constitutional principle of equal representation for equal numbers of people, this Court's cases judging the constitutionality of challenges under *Reynolds* have focused on how far the state's redistricting plans deviated from total population, and whether there was a legitimate government justification for the deviation from the ideal of population equality. *See, e.g.*, *Mahan*, 410 U.S. at 329 (concluding that maximum deviation of 16.4% from total population equality "may well approach tolerable limits"); *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973) (holding that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima face case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State"); *Connor v. Finch*, 431 U.S. 407, 418 (1977) (noting that "maximum population deviations of 16.5% in the Senate districts and 19.3% in the House districts can hardly be characterized as de minimis"); *Brown v. Thomson*, 462 U.S. 835, 843-44 (1983) (concluding that plan's "deviation from population equality—60% below the mean—is more than minor" but finding deviations from total population equality justified by the "consistent and nondiscriminatory application of a legitimate state policy"); *see also* Appellees' Br. at 28-31 (collecting cases). This basic approach properly treats total population as the benchmark for analysis of a one-person, one-vote claim, measuring whether a state's plan comports with "the

---

321. Indeed, in applying its holding to the facts of the case, *Reynolds* noted that "although about 43% of the State's total population would be required to comprise districts which could elect a majority ., only 39 out of the 106 House seats were actually to be distributed on a population basis," concluding that "the deviations from a strict population basis are too egregious . to be constitutionally sustained." *Reynolds*, 377 U.S. at 569.

fundamental principle . . . of equal representation for equal numbers of people." *Reynolds*, 377 U.S. at 560-61.

Indeed, this Court recognized in *Gaffney* that total population figures—though inherently imperfect—nevertheless form the "basic statistical materials which legislatures and courts usually have to work with." 412 U.S. at 745. Total population remains the touchstone for assessing state compliance with the Constitution's principle of equal representation even though, as *Gaffney* explained, "total population—even if stable and accurately taken—may not actually reflect th[e] body of voters . . . . The proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States." *Id.* at 746-47; *see also Daly v. Hunt*, 93 F.3d 1212, 1224 (4th Cir. 1996) ("The *Gaffney* Court used total population figures to analyze the legislative apportionment plan at issue there even after observing that the congressional districts from the same state contained significant variations in terms of age-eligible voters."). Notwithstanding this recognition, this Court has continued to use total population as the basic measure of analysis. This reflects that, as the Framers of Article I, Section Two and the Fourteenth Amendment understood, total population is the "natural & precise measure of Representation," 1 *Farrand's Records*, *supra*, at 605, and "the only true, practical, and safe republican principle." Cong. Globe, 39th Cong., 1st Sess. 2767 (1866). When a state strives to ensure equal representation for all persons by drawing districts of substantially equal persons, it comports with the command of the one-person, one-vote principle.

To be sure, "state reapportionment is the task of local legislatures or of those organs of state government selected to perform it," *Gaffney*, 412 U.S. at 751; *see also Mahan*, 410 U.S. at 322 (observing that "broader latitude has been afforded the States under the Equal Protection Clause"), and states may have some leeway to deviate from the total population standard where local state concerns warrant such a departure. *See Gaffney*, 412 U.S. at 748-49 (noting that "[f]air and effective representation . . . does not depend solely on mathematical equality among district populations" and that there are "other relevant factors to be taken into account and other important interests that States may be legitimately mindful of"); *Burns v. Richardson*, 384 U.S. 73, 94-95 (1966) (approving state districting plan where, because of tourist and military population included in the census, "[t]otal population figures . . . constitute a substantially distorted reflection of the distribution of state citizenry"). But, as this Court's cases reflect, total population remains the benchmark for enforcing the Constitution's guarantee of equal representation for equal numbers of people.

Evenwel's basic position—that the Constitution requires districts composed of equal numbers of voters—ignores the total population standard reflected in the Constitution's text and history, is inconsistent with the broad sweep of the equal protection guarantee, has no basis in this Court's precedents from *Wesberry* on, and would seriously hamstring efforts by state governments to ensure equal representation for all persons. In Evenwel's view, the total population standard the Constitution mandates when it comes to congressional redistricting is constitutionally forbidden in state and local redistricting. No court in American history has ever adopted this radical re-

writing of the basic constitutional principle of equal representation for equal numbers of people. This Court should not do so now. Because the districting plan here comports with the principle of substantial population equality, the judgment of the district court should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

DOUGLAS T. KENDALL
ELIZABETH B. WYDRA*
DAVID H. GANS
BRIANNE J. GOROD
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1200 18th Street NW
Suite 501
Washington, D.C. 20036
(202) 296-6889
elizabeth@theusconstitution.org

Counsel for Amicus Curiae

September 25, 2015

* Counsel of Record

No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, In His Official Capacity as Governor of Texas, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF THE DEMOCRATIC NATIONAL COMMITTEE, AS *AMICUS CURIAE* SUPPORTING APPELLEES

ROBERT F. BAUER
Counsel of Record
MARC ERIK ELIAS
WILLIAM B. STAFFORD
PERKINS COIE LLP
700 Thirteenth Street, N.W.
Suite 600
Washington, DC 20005-3960
(202) 654-6200
RBauer@perkinscoie.com

Counsel for Amicus Curiae

September 25, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
A. All American Residents Are Entitled to Representation By Elected Officials and a Voice in American Politics	4
B. The Text and History of the Fourteenth Amendment Support Use of Total Population as the Apportionment Base of State and Local Electoral Districts	9
C. The Necessary Data to Draw Districts Containing an Equal Number of Citizens Does Not Exist	14
CONCLUSION	19

TABLE OF AUTHORITIES

CASES	Page(s)
Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015)	4
Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281 (D.D.C. 2011) *aff'd*, 132 S. Ct. 1087 (2012)	5
Burns v. Richardson, 384 U.S. 73 (1966)	4
Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000)	13
Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996)	17
Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999)	15
Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990)	7
Levy v. Louisiana, 391 U.S. 68 (1968)	10
McConnell v. Fed. Election Comm'n, 540 U.S. 93 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)	6
McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014)	6
Plyler v. Doe, 457 U.S. 202 (1982)	9, 10
Reyes v. City of Farmers Branch, 586 F.3d 1019 (5th Cir. 2009)	19
Reynolds v. Sims, 377 U.S. 533 (1964)	7, 8, 9, 13

TABLE OF AUTHORITIES—Continued

Page(s)

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 10

CONSTITUTIONAL PROVISIONS

U.S. Const. amend I 6

U.S. Const. amend. XIV ..... *passim*

OTHER AUTHORITIES

11 C.F.R. § 110.20 6

Cong. Globe, 39th Cong., 1st Sess. 141 (1866) .. 13

Cong. Globe, 39th Cong., 1st Sess. 877 (1866) .. 12

Cong. Globe, 39th Cong., 1st Sess. 2986-87 (1866) 12

Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas, in 1 America Becoming: Racial Trends and Their Consequences* (Neil J. Smelser et al. eds., 2001) 12

The Federalist No. 10 (James Madison) 5

The Federalist No. 54 (James Madison) 11

George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 Fordham L. Rev. 93, 96-100 (1961)..... 11, 12

Joseph T. Sneed III, *Footprints on the Rocks of the Mountain: An Account of the Enactment of the Fourteenth Amendment* 35 (1997)..... 11

TABLE OF AUTHORITIES—Continued

Page(s)

The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them, Cardozo L. Rev. 755 (2011).... 16

Sandra L. Colby & Jennifer M. Ortman, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060* 7, 8

Sarah K. Cowan, *Periodic Discordance Between Vote Equality and Representational Equality in the United States*, 2 Soc. Sci. 442, 447 (2015) 12

Texas Legislative Council, *Estimating Citizenship Voting Age Population Data (CVAP), Addendum to Data for 2011 Redistricting in Texas* (Mar. 2013), http://www.tlc.state.tx.us/redist/pdf/addendum_2011_Redistricting.pdf 17

U.S. Census Bureau 10 (Mar. 2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf 7, 8

U.S. Census Bureau, *American Community Survey (ACS), Comparing ACS Data*, https://www.census.gov/programs-surveys/acs/guidance/comparing-acs-data.html 15

U.S. Census Bureau, *American Community Survey (ACS), Sample Size Definitions*, http://www.census.gov/programs-surveys/acs/methodology/sample-size-and-data-quality/sample-size-definitions.html 15

INTEREST OF *AMICUS CURIAE*

Amicus curiae is the Democratic National Committee (the "DNC"), which is responsible for governing the Democratic Party. The DNC was created during the Democratic National Convention of 1848 and is the oldest continuing party committee in the United States. The DNC promotes the Democratic Platform, which is the statement of core principles at the heart of the Democratic Party, and which manifests the Democratic Party's commitment to representation and inclusion of all people in the Nation's political life. Among other things, the DNC coordinates strategy to support candidates throughout the country for local, state, and national office, and works with various constituencies to respond to the needs and views of Democrats across the Nation. The DNC therefore has substantial expertise in constitutional issues related to equal protection of the laws and political representation. This expertise bears directly on the issues before the Court.[1]

SUMMARY OF ARGUMENT

The United States District Court for the Western District of Texas properly rejected Appellants' claim that a state legislature violates the Equal Protection Clause of the United States Constitution by apportioning districts on the total population of all residents as calculated in the decennial Census—as opposed to an estimate of citizen-voting age population

---

[1] Pursuant to Rule 37.6, the DNC hereby states that no counsel for any party authored the brief in whole or in part and no person or entity other than the DNC made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief by filing with the Clerk blanket consents to the submission of *amicus* briefs.

("CVAP") premised on sampling. Appellants' claim is unsupported by the text and history of the Fourteenth Amendment and this Court's prior jurisprudence.

Amicus Curiae DNC submits this brief to note further that use of total population as the apportionment base is consonant with the basic principles of the Democratic Party and this Nation as a whole, is grounded in the text and history of the Fourteenth Amendment, and is the near-uniform practice of jurisdictions throughout the United States. The DNC therefore respectfully submits that the Court should hold definitively that state and local jurisdictions must apportion state and local districts on the basis of total population.

First, use of total population as the apportionment base properly recognizes that all residents of a given geographic area—regardless of whether they are currently eligible voters—are members of this Nation's body politic who are entitled to representation. All residents—be they children, noncitizen immigrants, or eligible voters—are members of the wider political community whose interests should be taken into account by their elected representatives. A representative serving a locality with a high percentage of children should, for example, take those children's educational needs into account. A representative serving a locality with a high immigrant population *should* take that community's needs and interests into account. Adopting Appellants' position would be to adopt the view that all persons *except* eligible voters are nonentities as far as political representation is concerned.

Second, use of total population as the apportionment base comports with the text of the Fourteenth Amendment and its history. In adopting a new system

of representation after the Civil War, the authors of the Fourteenth Amendment consciously chose to require that congressional districts be drawn on the basis of all "persons" as opposed to all "voters." The Equal Protection Clause of the Fourteenth Amendment—the wellspring of this Court's jurisprudence requiring that state legislative districts be drawn on a population basis—similarly extends the equal protection of the laws to all "persons." It would be anomalous if the Fourteenth Amendment's authors on the one hand mandated that *total* population be used to draw congressional districts and that *voter* population be used to draw state legislative districts.

Third, practical considerations counsel strongly against the use of estimates of citizen population as an apportionment base. Appellants urge the Court to mandate a profound intrusion on existing redistricting practices. With limited exceptions, the uniform practice of jurisdictions throughout America is to draw districts based on total population as reported in the decennial Census. Adopting the rule Appellants advance would thus throw out (or, at the very least, call into constitutional question) nearly every state and local electoral district in the United States.

There is a good reason why—to the DNC's knowledge—there is not a single state in the country that draws districts on the basis of CVAP. The United States Census does not ask respondents to report their citizenship status. There is thus *no accurate* data regarding CVAP down to the census block level, as would be required to accurately draw districts of equal CVAP. The best available estimate of citizen population is derived from the American Community Survey ("ACS"), which is based on a sample of a fraction of American households and simply is not accurate to the

level of granularity necessary to ensure that local electoral districts contain an "equal" number of citizens.

For all these reasons, the Court should affirm the judgment below and further hold that the Fourteenth Amendment requires that all persons residing in the United States must be taken into account when drawing state and local electoral districts.

ARGUMENT

A. All American Residents Are Entitled to Representation By Elected Officials and a Voice in American Politics

The issue before the Court goes to the heart of what it means for America to be a representative democracy. Do states have a choice between representational or political equality in apportioning districts, or is one of the two binding on them as a matter of constitutional law?

The Court confronted the question about the nature of representation once before, in *Burns v. Richardson*, 384 U.S. 73 (1966). It chose not to answer it. *Burns* arose in the early days of the Court's one-person, one-vote jurisprudence, with elections in Hawaii looming and in regard to an interim districting plan. In those circumstances, the Court proceeded cautiously, determining that "[t]he decision to include or exclude any . . . group [in the apportionment base] involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." *Id.* at 92.

In the half-century since *Burns*, the one-person, one-vote doctrine has become a central pillar of redistricting—so foundational that it is just "part of

the redistricting background." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015). Having concluded that the Constitution demands population equality *between* districts, the Court should hold that the Constitution requires "equality" *within* districts.

The reasons lie in the American conception of the nature of representation. Our elected representatives' task is to serve the larger good of the community rather than the interests of a few. It is on the basis of this conception that the Founders established a representative rather than a pure democracy "to refine and enlarge views of the public good, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country." The Federalist No. 10 (James Madison). Nowhere is there found the contrary and extraordinary judgment that legislators answer only to those who have put them in office—that legislators and their voters are somehow bound together in a relationship of reciprocal benefit, with all other residents excluded from the represented "constituency" and looking in from the outside.

Those who reside within our borders make up a political community that is not defined by eligibility to vote. In fact, the right to vote does not determine the availability of other means of political participation in this political community, such as making campaign contributions or expenditures. "[M]any groups of people who are not entitled to vote may nonetheless make contributions and expenditures related to elections—for example, minors [and] American corporations" because these nonvoters "are all members of the American political community." *Bluman v. Fed. Election Comm'n*, 800 F. Supp. 2d 281, 290 (D.D.C.

2011) *aff'd*, 132 S. Ct. 1087 (2012). It would make little sense to speak of a "political community" comprised of both voters and nonvoters, while insisting that each legislator's constituency consists only of those who vote.

And it would be similarly peculiar to construe the right to influence elections more broadly than the right to be represented by those who are eventually elected. This Court has stood firmly behind the First Amendment right of nonvoters to make political contributions to candidates. *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 231 (2003), *overruled on other grounds by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010). In *McConnell*, the Court struck down an absolute prohibition on contributions by minors under 18 years of age. Likewise, lawful permanent residents are entitled to make political contributions. 11 C.F.R. § 110.20. It is difficult to see how these nonvoters have a constitutionally or statutorily guaranteed right to support candidates but that in calculating those candidates' constituency, they are to be excluded.

On this view, candidates would be free to take nonvoters' money but would owe them no duty of representation. Or worse, the nonvoters who contribute would have a call on candidates' attention—the "access" and "ingratiation" this Court recognized in *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014) (internal quotation marks and citation omitted)—but only because they contributed, and not on the understanding that they belong to the wider political community the legislator represents. This is a view of the polity and how it functions that the Founders surely would have rejected.

For these reasons, the Court should find that states must use total population as the basis for apportionment. To leave it to the choice of legislatures—while it is an alternative superior to the unacceptable course urged by Appellants—is to endorse a vision of representative democracy that cannot be reconciled with founding principles or this Court's one-person, one-vote jurisprudence. It is also to invite a choice shaped by political calculation. The discretion to pick the apportionment base is the discretion to manipulate district lines for political gains.

Moreover, excluding nonvoting residents from the apportionment base of electoral districts would send a clear message of exclusion—that these nonvoting residents are *unrepresented* even though they pay taxes, use government services, and are subject to American law. Such a state of affairs would bear an uncomfortable resemblance to a regime of "taxation without representation." Those who are subject to a government's authority have the right to hold that government to account. *See, e.g., Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990) ("[T]he people, including those who are ineligible to vote, form the basis for representative government. Thus population is an appropriate basis for state legislative apportionment.") (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)).

The effect of excluding nonvoters from the apportionment base would have particularly pernicious consequences for people of color. In 2014, a "much smaller percentage of the child population" was non-Hispanic White alone (52%) compared to the total

population (62%).[2] In other words, "[t]he racial and ethnic composition of the United States is markedly different when looking at just children, under 18 years of age." *Id.*

This is particularly true for fast-growing Latino communities. Whereas 17.4% of the total population of the United States in 2014 was Latino, 24.4% of the under-18 population was Latino. Every month, roughly 66,000 Latino U.S. citizens turn 18. Of the more than 3 million Latinos who will turn 18 between 2012 and 2016, close to 60% come from immigrant households. Forcing states to apportion based on CVAP would obscure these marked demographic shifts. States typically draw new districts once every ten years. Ignoring the existence of youth populations will "lock in" underrepresentation for Latinos throughout an entire decade.

In sum, in our representational democracy, elected officials represent the interests of voters and nonvoters alike. Excluding current nonvoters from the apportionment base of state and local electoral districts cannot be reconciled with the core conception of representation ingrained in our founding principles, nor with this Court's one-person, one-vote jurisprudence. The Court should squarely address the question left unanswered in *Burns* and find that states and localities must use total population as the basis for apportionment.

---

[2] Sandra L. Colby & Jennifer M. Ortman, *Projections of the Size and Composition of the U.S. Population: 2014 to 2060*, U.S. Census Bureau 10 (Mar. 2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf.

B. The Text and History of the Fourteenth Amendment Support Use of Total Population as the Apportionment Base of State and Local Electoral Districts

In *Reynolds*, this Court held "that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." 377 U.S. at 568. The text and history of the Fourteenth Amendment further suggest that total population is the proper and, indeed, required apportionment base for state and local legislative districts. In particular, it follows from the Fourteenth Amendment's use of the inclusive term "persons," grounded in a principle of representational equality, that total population—not CVAP or any other metric—be the apportionment base for both congressional and state legislative districts.

The Equal Protection Clause (Section 1 of the Fourteenth Amendment) provides that no state may "deny to any person within its jurisdiction the equal protection of the laws." This language is plain and expansive. It applies to *all* persons within the jurisdiction of a state. Not all citizens or all voters—all persons.

The historical record reflects that the drafters of the Fourteenth Amendment meant what they said. As the Court has recognized, the congressional debate regarding the Equal Protection Clause reflects that Congress intended the most expansive application, even "to ensure that the equal protection of the laws

was provided to the alien population." *Plyler v. Doe*, 457 U.S. 202, 213-14 (1982).

Thus, this Court has routinely interpreted the Equal Protection Clause to guarantee all *persons* the right to equal protection under the law:

> The fourteenth amendment to the constitution is not confined to the protection of citizens. It says: "Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *These provisions are universal in their application, to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (emphasis added). That is true regardless of whether an immigrant is documented or undocumented. *Plyler*, 457 U.S. at 210 (rejecting the argument "that undocumented aliens, because of their immigration status, are not 'persons within the jurisdiction' of the State of Texas, and that they therefore have no right to the equal protection of Texas law" because "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term"). And the same is true of children. *See id.; see also Levy v. Louisiana*, 391 U.S. 68, 70 (1968) ("[I]llegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment.").

The drafters of the Fourteenth Amendment did not expressly address the application of equal protection to state and local reapportionment. But Section 2 of the Fourteenth Amendment ("Section 2")—which chiefly concerns apportionment of the United States House of Representatives—sheds substantial light on the subject.

Section 2 uses the same terminology and reflects the same legislative purpose as Section 1. *See* U.S. Const. amend. XIV, § 2 ("Representatives shall be apportioned among the several states according to their respective numbers, *counting the whole number of persons* in each state, excluding Indians not taxed." (emphasis added)). Section 2 amended Article I, Section 2 of the Constitution, which apportioned representation in the House of Representatives on the basis of the whole number of free persons and "three-fifths of all other persons"—i.e., slaves. The use of "persons" in Article I, Section 2, and later in the Fourteenth Amendment, ensured that the "aggregate number of representatives allotted" to each state would be "founded on the aggregate number of inhabitants." The Federalist No. 54 (James Madison). The Founders thus knowingly included populations unable to vote—such as women, children, convicts, persons without property, and noncitizens—for purposes of congressional apportionment.

In drafting the Fourteenth Amendment, Congress not only chose to echo Article I, Section 2's "whole number of persons" language, but also expressly rejected alternate proposals that would have apportioned Representatives based on eligible voters. In an early House version of Section 2, Representative Thaddeus Stevens introduced a constitutional amendment that would apportion Representatives "according

to their respective legal voters." Joseph T. Sneed III, *Footprints on the Rocks of the Mountain: An Account of the Enactment of the Fourteenth Amendment* 35 (1997). But Republican majorities in Congress rejected Stevens' amendment and subsequent, similar proposals. George David Zuckerman, *A Consideration of the History and Present Status of Section 2 of the Fourteenth Amendment*, 30 Fordham L. Rev. 93, 96-100 (1961) (describing the failure of four separate proposals to base apportionment on eligible voters). They did so recognizing that using total population as the basis of apportionment meant that districts might have widely varying numbers of eligible voters. For example, while western states had a relatively higher percentage of eligible voters given their disproportionately male-heavy populations, northern states had relatively high concentrations of foreign-born noncitizens and women, and former Confederate states were home to millions of newly freed, but disenfranchised, former slaves. *Id.* at 95.[3] The drafters noted that

---

[3] *See* Cong. Globe, 39th Cong., 1st Sess. 877 (1866) (Sen. Hendricks noting that the female population of the six New England states exceeded the male population by 50,000, while in the six agricultural states of the West—Ohio, Indiana, Kentucky, Illinois, Missouri, and Iowa—the male population exceeded the female population by 297,758); Cong. Globe, 39th Cong., 1st Sess. 2986-87 (1866) (Sen. Wilson noting that the northern states contained 2.1 million unnaturalized foreigners who would be excluded from the apportionment base if citizenship were the standard). These species of population deviations have always been features of American political life. For example, in 1910, California had 40% more men than women, whereas New York had 2% more men than women. Sarah K. Cowan, *Periodic Discordance Between Vote Equality and Representational Equality in the United States*, 2 Soc. Sci. 442, 447 (2015). Likewise, contrary to Appellants' suggestion that large immigrant populations are a new phenomenon, many localities throughout American history have had significant foreign-born

adopting a voter-based rather than a population-based apportionment scheme would ignore the *representational* interests of groups that were otherwise denied the franchise. As Representative James G. Blaine of Maine stated on the House floor on January 8, 1866: "As an abstract proposition no one will deny that population is the true basis of representation; for women, children, *and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot*." Cong. Globe, 39th Cong., 1st Sess. 141 (1866) (emphasis added).[4]

The historical record reflects that, by requiring apportionment on the basis of all "persons," Congress decisively resolved the debate in favor of a representational equality model that apportioned representatives on the total number of persons, as opposed to an "electoral equality" model based on eligible voters. *See Chen v. City of Houston*, 206 F.3d 502, 527 (5th Cir. 2000) ("[T]he drafters of the Fourteenth Amendment, on which *Reynolds* itself rests, do appear to have debated this question, and

---

populations. For example, in 1960, 15.5% of the population of El Paso, Texas was foreign-born. Douglas S. Massey, *Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas*, *in* 1 *America Becoming: Racial Trends and Their Consequences* (Neil J. Smelser et al. eds., 2001).

[4] At the time of the Fourteenth Amendment's passage, the franchise was still denied to African-Americans in many jurisdictions. Not until the passage of the Fifteenth Amendment were the federal and state governments precluded from denying a citizen the right to vote based on that citizen's "race, color, or previous condition of servitude." Likewise, the franchise was not extended to women for decades, until the ratification of the Nineteenth Amendment in 1920.

rejected a proposal rooted in—among other things—the principle of electoral equality.").

To be sure, Section 2's apportionment scheme does not apply directly to state legislative districts and the apportionment of congressional districts raises distinct federalism concerns. But that does not mean that the text and history of Section 2 is irrelevant to the issue before the Court. It simply strains credulity that (as Appellants necessarily argue) the authors of the Fourteenth Amendment intended to use the same word—"persons"—to constitutionally mandate *congressional* apportionment on the basis of total population and *state legislative* apportionment on the basis of eligible voters. This is especially unlikely when the concept of representation adopted by the Founders is taken fully into account—the representation of *all* residents. Nowhere is found the suggestion that this principle was to be protected at the federal level, then abandoned at the state and local level, of American government.

C. The Necessary Data to Draw Districts Containing an Equal Number of Citizens Does Not Exist

Finally, the DNC notes that Appellants proffer an unworkable constitutional standard that would be highly disruptive to existing redistricting practices and highly problematic for localities to implement. This is because there is no data that definitively establishes the number of citizens and noncitizens residing in particular locales at the level of granularity necessary to conduct districting. Appellants ask this Court to establish a principle that would hold unconstitutional "deviations" in the estimates of

CVAP that may well be the result of sampling errors. Even assuming the abstract merit of drawing districts based on CVAP, the data necessary to do so simply do not exist.

As discussed above, reapportionment is presently conducted throughout the United States using total population data from the decennial Census. The Census counts every person who lives in the 50 states, the District of Columbia, and U.S. territories. It is thus based on an actual population count and not on sampling. Indeed, this Court has held that the Census Act actually "prohibits the use of sampling for apportionment purposes." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 342 (1999) (addressing use of sampling data by U.S. Census Bureau with respect to reapportionment of congressional districts).

Appellants argue that the Fourteenth Amendment requires apportionment of state legislative districts based on "eligible voters"; i.e., CVAP. The United States Census does not ask questions about citizenship. Thus, for purposes of reapportionment, there is no actual, accurate count of the residential location of citizens and noncitizens in the United States.

The most commonly used estimate of citizen population comes from the American Community Survey ("ACS"), administered by the Census. The ACS provides "estimates" based on "a sample of housing units and people in the population, not the full population." U.S. Census Bureau, *American Community Survey (ACS), Sample Size Definitions*, http://www.census.gov/programs-surveys/acs/methodology/sample-size-and-data-quality/sample-size-definitions.html. The ACS is, however, a survey, not a census. The periodic surveys done by the ACS over the

last ten years were based on a sample population of 3.5 million or less. *Id.* That is, ACS's estimates are based on reporting from just 2% of American households. Necessarily, then, "ACS estimates have a degree of uncertainty associated with them, called sampling error." *Id.* This is why the Census Bureau cautions that ACS data should be used "to obtain population characteristics (percents, means, medians, and rates) rather than estimates of population totals." U.S. Census Bureau, *American Community Survey (ACS, Comparing ACS Data*, https://www.census.gov/programs-surveys/acs/guidance/comparing-acs-data.html.

There are at least four inherent limitations of the ACS estimates of citizenship population that render the ACS survey inadequate for the task of drawing districts of equal number of citizens. *See generally* Nathaniel Persily, 32 *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, Cardozo L. Rev. 755 (2011).

First, because the ACS is a sample of a relatively small share of the population, ACS surveys do not produce data at the sufficiently local level necessary for redistricting (the census block level). Thus, while the ACS is a useful tool for capturing aggregate-level data (such as the profile of a state or large regions within a state), it is a tool that is necessarily lacking at more granular levels, because a 2% national survey often does not include enough people to provide an accurate estimate of citizenship rates in small geographic areas, such as specific neighborhoods.

Second, and relatedly, the ACS does not even *provide* an estimate of the citizen voting age population at the census block level, which is the data used to reapportion districts. Rather, estimated

citizenship data is available only at the census block group level. This is important because census block groups are often split between multiple districts. Disaggregating the estimated citizenship data from the block group level to the block level thus requires use of further methodological assumptions and estimates that necessarily create further uncertainty about the estimate's accuracy. For example, in Texas, the government entity responsible for developing data to support redistricting used a citizenship estimation methodology that meant "some people who live outside the district are included in the district estimates, and some people who live in the district are not included in the district estimates." Tex. Legislative Council, *Estimating Citizenship Voting Age Population Data (CVAP), Addendum to Data for 2011 Redistricting in Texas* (Mar. 2013), http://www.tlc.state.tx.us/redist/pdf/addendum_2011_Redistricting.pdf. In other words, redistricting using CVAP requires the use of an estimate on top of an estimate, with all the attendant lack of precision that entails.

Third, because the ACS is a survey, and not a census, it is backward-looking. That is, the ACS provides estimates of what citizenship rates were in the past, rather than an accurate count of citizenship rates at the time of redistricting (which the Census itself provides) "with regard to total population."

Finally, use of CVAP to reapportion districts would systematically undercount young voters, excluding from the apportionment base young citizens who turn 18 after completion of the decennial redistricting process. *See, e.g., Daly v. Hunt*, 93 F.3d 1212, 1228 (4th Cir. 1996) ("[U]sing voting-age population as the apportionment base would ignore the voting strength of those persons who are between the ages of 8 and 17

at the time of the apportionment, but who would become eligible to vote before the next apportionment."). Moreover, because the under-18 population in America is much more diverse than the over-18 population, the use of CVAP would also disproportionately exclude persons of color from the count of a district's population.

Appellants' brief elides the fundamental "data" problem with their claim entirely, while still reflecting it. For example, in Tables 2 and 3 in their brief, Appellants present data reflecting the supposed "deviations" in "voting power" in Senate Districts 1 and 4. Appellants provide three *separate* estimates of the citizen population of these districts, based on three separate ACS surveys. Appellants do not provide the margin of error for these various estimates (or acknowledge that one exists). And the three estimates of CVAP vary widely; by more than ***16,000*** among the three estimates in Senate District 1 and by roughly ***27,000*** in Senate District 4. These are not trivial differences.

As the organizing body of the Democratic Party, the DNC has a keen interest in the composition of the myriad state and local districts in the United States, all of which are based on total population or some derivation of it. If this Court holds that states *must* redistrict using CVAP estimates, all of these districts will be unconstitutional or, at the very least, have their constitutionality called into serious question and subject to legal challenge. Further, given the inherent limitations of the ACS survey, the floodgate of litigation that would be opened by the mandated use of CVAP would pose thorny methodological questions. What effect does the margin of error have on the maximum permissible population deviation between

districts? Does the Fourteenth Amendment mandate a particular methodology for calculating a CVAP estimate at the census block level? If not, are there any restrictions on a local redistricting body's discretion to calculate a CVAP estimate for redistricting purposes?

These questions presently have no answer because no court has ever held that the Fourteenth Amendment mandates the use of CVAP in reapportioning state and local legislative districts. The DNC respectfully submits that the basic impracticality of using CVAP estimates as the basis of apportionment counsels strongly against the adoption of the constitutional rule for which Appellants advocate.[5]

CONCLUSION

Appellants ask this Court to issue a holding that would either strike down every legislative district in the country or render it susceptible to immediate legal challenge. And they ask the Court to do so based on an "electoral equality" theory that is completely untethered from constitutional text, precedent, and practice. It is a theory that disregards and would

---

[5] To be sure, ACS estimates of CVAP may be used appropriately for other purposes. For example, a plaintiff might claim, under Section 2 of the Voting Rights Act, that a jurisdiction's failure to draw a "majority-minority" district diluted the vote of the minority population in question. Some circuit courts have held that such a plaintiff must show, by a preponderance of the evidence, that it is possible to draw a district where the minority group in question forms a majority of the district's CVAP. *See, e.g.*, *Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1022-23 (5th Cir. 2009). If a plaintiff could not use ACS estimates for that purpose, no plaintiff could ever present a viable claim under Section 2. CVAP estimates are the best available data for this purpose.

indeed undermine the founding American conception of representation—that elected representatives consider and serve the interests of all residents, because they are expected when elected to attend to the interests of the whole political community of voters and nonvoters alike. The Court should reject this unsupportable theory and instead—in the course of upholding Texas' use of total population to draw its senate districts—hold now and conclusively that "total population" is the measuring stick for compliance with the "one-person, one-vote" mandate of the Fourteenth Amendment.

Respectfully Submitted,

ROBERT F. BAUER
Counsel of Record
MARC ERIK ELIAS
WILLIAM B. STAFFORD
PERKINS COIE LLP
700 Thirteenth Street, N.W.
Suite 600
Washington, DC 20005-3960
(202) 654-6200
RBauer@perkinscoie.com

Counsel for Amicus Curiae

September 25, 2015

No. 14-940

Supreme Court, U.S.
FILED
SEP 25 2015
OFFICE OF THE CLERK

In The
Supreme Court of the United States

SUE EVENWEL, et al.,

Appellants,

v.

GREG ABBOTT, in his official capacity as Governor of Texas, et al.,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

BRIEF OF AMICI CURIAE DIRECT ACTION FOR RIGHTS AND EQUALITY (DARE), EX-PRISONERS AND PRISONERS ORGANIZING FOR COMMUNITY ADVANCEMENT (EPOCA), VOICES OF COMMUNITY ACTIVISTS & LEADERS-NEW YORK (VOCAL-NY) AND VOICE OF THE EX-OFFENDER (VOTE) IN SUPPORT OF AFFIRMANCE

PETER WAGNER
ALEKS KAJSTURA
PRISON POLICY INITIATIVE
P.O. Box 127
Northampton, MA 01061
(413) 527-0845
pwagner@prisonpolicy.org

BRENDA WRIGHT
Counsel of Record
ADAM LIOZ
SCOTT NOVAKOWSKI
DEMOS
358 Chestnut Hill Ave.
Suite 303
Brighton, MA 02135
(617) 232-5885
bwright@demos.org

Counsel for Amici Curiae

September 25, 2015

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. INCARCERATED PERSONS ARE MISCOUNTED IN THE U.S. CENSUS, RESULTING IN PRISON GERRYMANDERING 5

II. THE GOAL OF REFORMING PRISON GERRYMANDERING IS ENTIRELY DISTINCT FROM APPELLANTS' MISGUIDED GOAL OF EQUALIZING ELIGIBLE VOTING POPULATION AMONG DISTRICTS 13

III. THE PROBLEM OF PRISON GERRYMANDERING MAY IMPLICATE EQUAL PROTECTION CONCERNS, BUT THOSE CONCERNS IN NO WAY SUPPORT APPELLANTS' ARGUMENT FOR A CONSTITUTIONAL RULE EXCLUDING NON-VOTERS IN REDISTRICTING 18

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000) 19

Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996) 19

Davidson v. City of Cranston, 42 F. Supp. 3d 325 (D. R.I. 2014) 18, 19, 20

Davidson v. City of Cranston, R.I., No. 1:14-cv-0091-L-LDA 7, 16

Fletcher v. Lamone, 831 F. Supp. 2d 887 (D. Md. 2011) 12

Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990) 19

Mitchell v. United States, 88 U.S. 350 (1874) 8

Muntaqim v. Coombe, 449 F.3d 371 (2d Cir. 2006) 7, 8

Stifel v. Hopkins, 477 F.2d 1116 (6th Cir. 1973) 7

CONSTITUTIONS AND STATUTES

Alaska Stat. § 15.05.020(1) (2011) 9

Ariz. Const. art. VII, § 3 9

Cal. Elec. Code § 2025 (2011) 9

Cal. Elec. Code § 21003 (2015) 12

Colo. Const. art. VII, § 4 9

Conn. Gen. Stat. § 9-14 (2011) 9

D.C. Code § 1-1001.02(16)(E) (2011) 9

TABLE OF AUTHORITIES – Continued

Page

Del. Code Ann. tit. 29 § 804A 12

Haw. Rev. Stat. § 11-13(5) (2011) 9

Idaho Code Ann. § 34-405 (2015) 9

Md. Code Ann., Elec. Law § 8-701 (2015) 12

Me. Rev. Stat. tit. 21-A, § 112(7) (2015) 9, 15

Mich. Comp. Laws § 168.11 (2011) 9

Minn. Const. art. VII, § 2 5

Miss. Code Ann. § 47-1-63 (2011) 9

Mo. Const. art. VIII, § 6 9

Mont. Code Ann. § 13-1-112(2) (2011) 9

N.H. Rev. Stat. Ann. § 654:2-a (2011) 9

N.M. Stat. Ann. § 1-1-7(D) (2011) 9

N.Y. Const. art. II, § 4 9

N.Y. Legis. Law § 83-m (13)(b) (McKinney 2011) 12

Nev. Const. art. II, § 2 9

Or. Const. art. II, § 4 9

25 Pa. Cons. Stat. § 1302(a)(3) (2011) 9

R.I. Gen. Laws § 17-1-3.1(a)(2) (2011) 9

Tenn. Code Ann. § 2-2-122(a)(7) (2011) 9

Tex. Elec. Code Ann. § 1.015(e) (2011) 9

Utah Code Ann. § 20A-2-101(2)(a) (2011) 9

Utah Code Ann. § 20A-2-105(3)(c)(iii) (2011) 9

TABLE OF AUTHORITIES – Continued

Page

Vt. Stat. Ann. tit. 17, § 2122 (2011) 9, 15

Wash. Const. art. VI, § 4 9

OTHER AUTHORITIES

Dr. Kenneth Prewitt, *Foreword* to Patricia Allard & Kirsten D. Levingston, Brennan Ctr. for Justice at NYU Sch. of Law, *Accuracy Counts* (2004) 11

Joanna Dreby, Ctr. for Am. Progress, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities* (2012).....14

Kirsten D. Levingston & Christopher Muller, Brennan Ctr. for Justice at NYU Sch. of Law, *"Home" in 2010: A Report on the Feasibility of Enumerating People in Prison at Their Home Addresses in the Next Census* (2006) 8, 13

Leah Sakala, Prison Policy Initiative, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity* (2014).....10

Letter from Professor Justin Levitt, Loyola Law School, to Ms. Karen Humes, Chief, Population Division, U.S. Bureau of the Census (July 20, 2015) 11

Peter Wagner & Daniel Kopf, Prison Policy Initiative, *The Racial Geography of Mass Incarceration* (2015).....10

TABLE OF AUTHORITIES – Continued

Page

Peter Wagner, *"'You don't live here (except on Census Day)' say local politicians"*, Prison Policy Initiative (Feb. 15, 2010) 7

Peter Wagner, *98% of New York's Prison Cells Are in Disproportionately White Senate Districts*, Prison Policy Initiative (Jan. 17, 2005) 10

Prison Policy Initiative & Common Cause Connecticut, *Ending Prison-Based Gerrymandering Would Aid the African-American and Latino Vote in Connecticut* (2010).....11

State of N.Y. Dep't of Corr. Serv., *HUB SYSTEM: Profile of Inmate Population Under Custody on January 1, 2008* 8

The Census Count and Prisoners: The Problem, the Solutions, and What the Census Can Do (Oct. 22, 2012) 17

U.S. Census Bureau, *Residence Rule and Residence Situations for the 2010 Census*, United States Census 2010 (Sept. 22, 2015).....6

INTEREST OF AMICI CURIAE[1]

DARE (Direct Action for Rights and Equality) is a grassroots membership-based organization in Rhode Island that organizes low-income families in communities of color for social, economic and political justice. The organization joined hundreds of low-income people of color to protest the city of Providence's most recent redistricting and the organization actively supported Rhode Island's successful 2006 voter initiative to re-enfranchise people on probation and parole. In 2010, DARE launched Rhode Island's campaign to end prison gerrymandering, an effort which has led to legislation twice unanimously passing the state Senate.

EPOCA (Ex-Prisoners and Prisoners Organizing for Community Advancement) is a grassroots membership-based organization in Massachusetts that works to create resources and opportunities for those who have paid their debt to society. The organization led a coalition of groups to successfully lead the Massachusetts legislature in passing a bipartisan resolution calling for the Census Bureau to change

---

[1] Pursuant to Supreme Court Rule 37.6, amici curiae state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici curiae and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have given blanket consent to the filing of amicus briefs, and have filed letters of consent with this Court.

the usual residence rule and count incarcerated people at home.

VOCAL-NY (Voices Of Community Activists & Leaders-New York) builds power among people affected by HIV/AIDS, drug use and mass incarceration to create healthy and just communities. In 2009 and 2010, the organization was a leader in the successful statewide effort to pass New York State's historic law ending prison gerrymandering, which requires that incarcerated people are counted at home for state and local legislative redistricting purposes, and in 2011 was a successful intervener-defendant in state litigation that had challenged that law. VOCAL-NY has worked with the Yes We Count! coalition to reduce the "census undercount" in 2010 by encouraging low-income New Yorkers who are least likely to participate in the Census to fill out and return their forms and has campaigned in favor of policy reforms to strengthen our democracy, including non-partisan redistricting and expanding the electorate.

VOTE (Voice of the Ex-Offender) is a grassroots, membership-based organization in Louisiana that works to protect and expand civic engagement and voting rights of the people most critically impacted by the criminal justice system, especially formerly incarcerated persons, their families and loved ones. Some of VOTE's work includes voter registration drives that ensure that formerly incarcerated people register to vote once they are eligible and become active participants in democracy and criminal justice reform. VOTE was also one of the leading organizations

in the Make City Council Work For Us Campaign, which aimed to ensure that the New Orleans City Council truly represented the city of New Orleans and not just particular neighborhoods and interests by changing the city charter to create an appropriate number of council districts. VOTE has also campaigned to end prison gerrymandering.

SUMMARY OF THE ARGUMENT

Amici long have been concerned with the injustices that flow from the manner in which the Census Bureau currently tabulates incarcerated persons in the U.S. Census, and the resulting impact on redistricting – problems that have come to be known as "prison gerrymandering." Although the case before this Court does not directly address the constitutionality of prison gerrymandering, Appellants nonetheless have suggested that their argument for removing non-voting individuals from the population base used for redistricting somehow is buttressed by the effort to reform prison gerrymandering. *See* Opp. to Mot. to Dismiss or Affirm 8.

Appellants' suggestion is flatly incorrect. Indeed, amici and many other groups that oppose prison gerrymandering also strongly oppose Appellants' effort to require states to limit the population base to voters. Accordingly, amici submit this brief in order to clear away potential confusion and explain how the

issue of prison gerrymandering does and does not relate to the issues before the Court in this case.

Section I of the brief describes the problem of prison gerrymandering and outlines its factual and legal context. Specifically, it explains why treating incarcerated persons as "residents" of the prison where they are involuntarily detained, instead of their home communities, creates serious inaccuracies and distorts redistricting, whether or not the incarcerated persons are eligible to vote.

Section II explains why the rule proposed by Appellants – that only voters be included in the population base for redistricting – would not cure the problem of prison gerrymandering. Most importantly, the problems stemming from the miscount of incarcerated persons are the result of *where* they are counted for redistricting purposes – not *whether* they are counted. Creating a constitutional requirement to exclude non-voting populations from the population base used for redistricting would not correct the distortions that flow from the miscount of incarcerated persons, and in fact could exacerbate those distortions.

Finally, Section III explains that the problem of prison gerrymandering may implicate Equal Protection concerns for reasons entirely distinct from the arguments advanced by Appellants. Appellants contend that the Fourteenth Amendment to the U.S. Constitution requires the Court to enshrine the goal of electoral equality above the goal of representational

equality. The constitutional arguments against prison gerrymandering, by contrast, require no judicial choice between the goals of electoral equality and representational equality, because prison gerrymandering cannot be justified by either theory of representation. Accordingly, to the extent they invoke the problem of prison gerrymandering as supporting their chosen Fourteenth Amendment theory, Appellants are relying on a false parallel.

ARGUMENT

I. INCARCERATED PERSONS ARE MISCOUNTED IN THE U.S. CENSUS, RESULTING IN PRISON GERRYMANDERING.

In conducting its decennial population count, the U.S. Census Bureau tabulates incarcerated persons as "residents" of the prison where they are involuntarily imprisoned. States and localities that use this Census Bureau data for redistricting purposes are counting incarcerated people in the wrong place – a practice commonly referred to as "prison gerrymandering." This practice results in serious population distortions in redistricting, and fails to reflect accurately the demographics of numerous communities throughout our country.

The problem flows from the Bureau's application of its "usual residence" rule, which defines an individual's residence as "the place where the individual

lives and sleeps most of the time,"[2] regardless of other factors relevant to determining actual residence. Because of this outdated rule and its flawed application in redistricting, some two million incarcerated people are being counted in the wrong place in the U.S. Census.

The nature of confinement at a prison strongly contradicts the notion that a prison is a "residence" in any normal sense of the word. Individuals confined at a prison are barred from interaction with neighbors and members of the community with which the Census Bureau combines them as "residents." They cannot visit local churches, schools or theaters, or patronize local businesses such as restaurants, grocery stores, gas stations and clothing stores. They cannot make use of parks, playgrounds, or public transportation, nor can they attend civic events in the community.

Even the children of incarcerated persons are often denied basic community services open to all other children whose parents actually reside in the community. For example, although Cranston, Rhode Island counts the population of the Adult Correctional Institutions (ACI) as "residents" of the city ward where the prison is located when apportioning ward

---

[2] U.S. Census Bureau, *Residence Rule and Residence Situations for the 2010 Census*, United States Census 2010 (Sept. 22, 2015), https://www.census.gov/population/www/cen2010/resid_rules/resid_rules.html.

districts, a parent incarcerated at the ACI is not allowed to claim residency there to have his child educated in Cranston public schools.[3] The incarcerated parent is a "resident" only for purposes of padding the population base of the ward containing the prison, but not for any other purpose.

Similarly, incarcerated persons typically are barred from claiming residence at the prison location for other purposes, such as filing for divorce[4] or claiming diversity jurisdiction in the federal courts.[5] The fact that a prison is not a residence also has been underscored in decisions such as *Muntaqim v. Coombe*, 449 F.3d 371 (2d Cir. 2006) (en banc) (per curiam) (plaintiff incarcerated in New York, but whose pre-incarceration residence was in California, lacked standing to challenge New York's laws disfranchising incarcerated persons because plaintiff could not rely on incarceration to claim residence in New York for voting purposes).

---

[3] Pls.' Statement of Undisputed Facts No. 18, *Davidson v. City of Cranston, R.I.*, No. 1:14-cv-0091-L-LDA, ECF No. 23 (D. R.I. dated Aug. 6, 2015).

[4] Peter Wagner, "*'You don't live here (except on Census Day)' say local politicians*", Prison Policy Initiative (Feb. 15, 2010), http://www.prisonersofthecensus.org/news/2010/02/15/divorce/#more-813.

[5] *Stifel v. Hopkins*, 477 F.2d 1116, 1121 (6th Cir. 1973) ("It makes eminent good sense to say as a matter of law that one who is in a place solely by virtue of superior force exerted by another should not be held to have abandoned his former domicile.").

The involuntary nature of imprisonment also weighs strongly against the notion that a prison cell can be a residence. Persons convicted of crimes do not choose to join the community where their prison is located, which is an essential element of effecting a change of domicile. *See, e.g.*, *Mitchell v. United States*, 88 U.S. 350, 353 (1874); *Muntaqim v. Coombe*, 449 F.3d at 376 ("because physical presence in a prison is necessarily involuntary, an 'inmate of an institution does not gain or lose a residence or a domicile, but retains the domicile he had when he entered the institution'"). Incarcerated persons have no control as to where they will serve their sentences, and upon release from incarceration, they typically return to their home communities rather than remaining in the community where the prison is housed.[6]

Moreover, once assigned to a prison, incarcerated persons typically may be involuntarily and frequently moved to a different prison location if prison administrators so decide. For example, statistics in New York State show that the median time an incarcerated person has been at his or her current facility is just over seven months.[7] Thus, an incarcerated person's

---

[6] Kirsten D. Levingston & Christopher Muller, Brennan Ctr. for Justice at NYU Sch. of Law, *"Home" in 2010: A Report on the Feasibility of Enumerating People in Prison at Their Home Addresses in the Next Census* 9 (2006), *available at* https://www.brennancenter.org/sites/default/files/legacy/d/download_file_36223.pdf.

[7] State of N.Y. Dep't of Corr. Serv., *HUB SYSTEM: Profile of Inmate Population Under Custody on January 1, 2008*, at ii (2008),

(Continued on following page)

presence at a particular prison location on Census Day is not only completely involuntary, but subject to immediate and frequent change based on largely unfettered discretion of prison administrators.

In stark contrast to the realities of incarceration, British common law and virtually all states define residence as the place a person chooses to be without a current intention to go elsewhere. Indeed, most states, constitutions and statutes go even further, explicitly declaring that incarceration by itself does not change a residence.[8]

The misallocation of incarcerated people could be dismissed as a mere quirk of the Census Bureau, but the stark and significant racial disparities in who goes to prison, and where prisons typically are located,

---

available at http://www.doccs.ny.gov/Research/Reports /2008/Hub_Report_2008.pdf.

[8] *See, e.g.*, Ariz. Const. art. VII, § 3; Colo. Const. art. VII, § 4; Minn. Const. art. VII, § 2; Mo. Const. art. VIII, § 6; Nev. Const. art. II, § 2; N.Y. Const. art. II, § 4; Or. Const. art. II, § 4; Wash. Const. art. VI, § 4; Alaska Stat. § 15.05.020(1) (2011); Cal. Elec. Code § 2025 (2011); Conn. Gen. Stat. § 9-14 (2011); D.C. Code § 1-1001.02(16)(E) (2011); Haw. Rev. Stat. § 11-13(5) (2011); Idaho Code Ann. § 34-405 (2015); Me. Rev. Stat. tit. 21-A, § 112(7) (2015); Mich. Comp. Laws § 168.11 (2011); Miss. Code Ann. § 47-1-63 (2011); Mont. Code Ann. § 13-1-112(2) (2011); N.H. Rev. Stat. Ann. § 654:2-a (2011); N.M. Stat. Ann. § 1-1-7(D) (2011); 25 Pa. Cons. Stat. § 1302(a)(3) (2011); R.I. Gen. Laws § 17-1-3.1(a)(2) (2011); Tenn. Code Ann. § 2-2-122(a)(7) (2011); Tex. Elec. Code Ann. § 1.015(e) (2011); Utah Code Ann. §§ 20A-2-101(2)(a), 20A-2-105(3)(c)(iii) (2011); V. Stat. Ann. tit. 17, § 2122 (2011).

compound its impact when states and localities draw legislative districts.

Analysis of 2010 Census data shows that Blacks are incarcerated at five times the rate of non-Hispanic Whites, and Latinos (including Hispanics) are incarcerated at a rate almost two times higher than non-Hispanic Whites.[9] These disparate rates of incarceration are combined with the enduring and troubling trend of building the prisons in communities that are very different demographically from the communities of people confined in the prisons.[10] When states and localities use these data for redistricting, it results in prison-gerrymandered districts, where Black and Latino incarcerated people are used to pad out districts to the benefit of predominantly White residents.[11]

---

[9] Leah Sakala, Prison Policy Initiative, *Breaking Down Mass Incarceration in the 2010 Census: State-by-State Incarceration Rates by Race/Ethnicity* (2014), *available at* http://www.prisonpolicy.org/reports/rates.html.

[10] Peter Wagner & Daniel Kopf, Prison Policy Initiative, *The Racial Geography of Mass Incarceration* (2015), *available at* http://www.prisonpolicy.org/racialgeography/report.html.

[11] For example, after the 2000 Census, virtually all – 98% – of New York State's prison cells were located in state senate districts that were disproportionately white, undermining the representation of African-American and Latino communities. Peter Wagner, *98% of New York's Prison Cells Are in Disproportionately White Senate Districts*, Prison Policy Initiative (Jan. 17, 2005), http://www.prisonersofthecensus.org/news/2005/01/17/white-senate-districts/. Similarly, in Connecticut, 75% of the state's prison cells were in state house districts that were disproportionately

(Continued on following page)

The facts about incarceration and residence have led a former Director of the U.S. Census Bureau and distinguished scholar, Dr. Kenneth Prewitt, to observe that "[c]urrent census residency rules ignore the reality of prison life."[12] Additionally, Professor Justin Levitt has aptly observed that:

> It would be in keeping with the bulk of the Census Bureau's representational logic to tally incarcerated individuals in the communities to which they are most closely connected on Census Day. That location is not where they are involuntarily confined, but rather where their relatives and friends and support systems are often located, where their children may live, where they are most likely to return when they are released from incarceration, and where their inclusion will illuminate and not distort the snapshot of the true local community.[13]

---

white. Prison Policy Initiative & Common Cause Connecticut, *Ending Prison-Based Gerrymandering Would Aid the African-American and Latino Vote in Connecticut* (2010), *available at* http://www.prisonersofthecensus.org/factsheets/ct/CT_African Americans_Latinos.pdf.

[12] Dr. Kenneth Prewitt, *Foreword* to Patricia Allard & Kirsten D. Levingston, Brennan Ctr. for Justice at NYU Sch. of Law, *Accuracy Counts* (2004), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/RV4_AccuracyCounts.pdf.

[13] Letter from Professor Justin Levitt, Loyola Law School, to Ms. Karen Humes, Chief, Population Division, U.S. Bureau of the Census at 6 (July 20, 2015) (footnote and citation omitted), *available at* http://redistricting.lls.edu/other/2015%20census%20residence%20comment.pdf.

Two states – Maryland and New York – have already responded to the distortions caused by prison gerrymandering by enacting legislation requiring that incarcerated persons be counted as residents of their home communities rather than of the prison for purposes of redistricting – legislation that was in effect for the 2010 redistricting process.[14] Two more states have enacted similar legislation that will go into effect for the 2020 Census.[15]

For all these reasons, amici and many others have called on the Census Bureau to change its practices so as to tabulate incarcerated persons at their home residence instead of at the prison where they are involuntarily and temporarily detained. As explained below, however, this reform effort in no way supports Appellants' Fourteenth Amendment claims in this case.

---

[14] *See* Md. Code Ann., Elec. Law § 8-701 (2015); N.Y. Legis. Law § 83-m (13)(b) (McKinney 2011). Although these laws call for most incarcerated persons to be reassigned to their home communities, they include exceptions, such as for incarcerated persons whose home residence is outside the state. A redistricting plan adopted in accordance with Maryland's reform law was challenged on one-person, one-vote grounds (among other legal challenges), and was unanimously upheld by a three-judge district court. *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011). This Court summarily affirmed. 133 S. Ct. 29 (2012).

[15] *See* Cal. Elec. Code § 21003 (2015); Del. Code Ann. tit. 29 § 804A (2010).

II. THE GOAL OF REFORMING PRISON GERRYMANDERING IS ENTIRELY DISTINCT FROM APPELLANTS' MISGUIDED GOAL OF EQUALIZING ELIGIBLE VOTING POPULATION AMONG DISTRICTS.

As noted above, Appellants have sought to bolster their arguments by suggesting that the goal of reforming prison gerrymandering somehow supports their argument for equalizing eligible voting population among districts. *See* Opp. to Mot. to Dismiss or Affirm 8. While the Bureau's current practices regarding tabulation of incarcerated populations can result in representational inequality, this is only because the incarcerated persons are being counted *in the wrong place* by states and localities when drawing district lines. The ultimate goal of reforming prison gerrymandering is not to eliminate incarcerated persons from the population count, but instead is to ensure that incarcerated persons are tabulated at the correct location – the home communities where their relatives and support systems exist and to which they will typically return on release from incarceration.[16]

The goal of Appellants' lawsuit is very different: it seeks to exclude non-citizens (and presumably other non-voters) entirely from the population count used in redistricting, even though non-citizens typically have ties with the location where they are counted that far exceed the ties of incarcerated persons to

---

[16] Levingston & Muller, *supra*, at 9.

the prison location. For example, unlike incarcerated persons who are counted in the prison location, non-U.S. citizens are counted in communities where they have strong actual ties to other members of the community. Indeed, they often reside and are counted in households that include family members who are U.S. citizens.[17] Unlike incarcerated persons, non-citizens and other non-voters are able to participate in the economic and civic life of the community where they are counted – they shop at grocery and clothing stores, gas stations and other establishments; attend religious services and support religious establishments; work and pay taxes in the community; and engage in civic and volunteer activities. None of these avenues for community engagement are available to the incarcerated persons who are counted as residents of the prison where they are housed.

Thus, Appellants' proposal that districts should be apportioned by equalizing the number of eligible voters in the population base would not alleviate the problem of prison gerrymandering. Consider the examples of Maine and Vermont, where incarcerated persons remain eligible to vote, but must vote absentee ballots in their home communities rather than in

---

[17] *See* Joanna Dreby, Ctr. for Am. Progress, *How Today's Immigration Enforcement Policies Impact Children, Families, and Communities* 1 (2012), *available at* https://www.americanprogress.org/wp-content/uploads/2012/08/DrebyImmigrationFamilies_execsumm.pdf.

the location where they are incarcerated.[18] Under Appellants' approach, incarcerated persons in Maine and Vermont would be included in the population base of the prison community for redistricting purposes because they are included in the Census Bureau's population tally, and they are eligible to vote. But they would not be included in the population base for redistricting in the home communities where they actually cast their ballots, because the Census Bureau does not include them in the population count in their home communities. Appellants' rule of electoral equality using Census Bureau data would thus result in a nonsensical attribution of incarcerated populations to communities where they cannot vote, while excluding them from the population count in the communities in which they actually do vote.

In contrast to Maine and Vermont, many states deny the franchise to persons serving sentences for conviction of a felony, and in these states, Appellants' proposed rule also fails to solve the problem of prison gerrymandering. An example of prison gerrymandering in Cranston, Rhode Island illustrates this point, and shows the difficulty of distinguishing voting from non-voting populations among incarcerated populations in Census data.

In Rhode Island, the sole state-run facility for adult incarcerated population is the Adult Correctional

---

[18] *See* Me. Rev. Stat. Ann. tit. 21-A, § 112(14) (2015); Vt. Stat. Ann. tit. 17, § 2122(a) (2015).

Institutions (ACI), located in Ward Six in the city of Cranston. The Census Bureau counts this population as "residents" of Cranston, and Cranston in turn has assigned this population entirely to Ward Six for purposes of drawing City Council and School Committee districts. Many incarcerated persons at the ACI remain eligible to vote because they are either awaiting trial or were sentenced on misdemeanors rather than felonies; but as with the voting-eligible incarcerated persons in Maine and Vermont, these individuals are required to vote absentee from their home communities, which are overwhelmingly located outside Ward Six of the City of Cranston.[19] Census data, however, do not distinguish between pre-trial and sentenced populations, and thus do not distinguish between voting-eligible and non-eligible incarcerated persons. Accordingly, to the extent Appellants seek to rely on voting-eligible population as the basis for drawing electoral districts, this would be completely unworkable in a setting such as the ACI in Cranston, where the pre-trial and sentenced populations are indistinguishable in the Census data.

All of this illuminates a core fact: the goal of reforming prison gerrymandering is not at all comparable to Appellants' goal of entirely excluding non-voters from the population base. The goal of reforming prison

---

[19] *See* Pls.' Mem. Supp. Pls.' Obj. Def.'s Mot. Summ. J. and Pls.' Cross-Mot. Summ. J. 11-12, *Davidson v. City of Cranston, R.I.*, No. 1:14-cv-0091-L-LDA, ECF No. 21-1 (D. R.I. dated Aug. 6, 2015).

gerrymandering seeks to count incarcerated persons properly as residents of their home communities, not to completely exclude non-voters from the population base.[20] Accordingly, Appellants cannot support their arguments by relying on false analogies between prison gerrymandering reform and their improper goal of entirely excluding non-voters from the redistricting calculus.

---

[20] In counting incarcerated people at the location of the prison, the Census Bureau makes two distinct errors that affect redistricting: 1) it fails to count incarcerated people where they reside, and 2) it counts incarcerated people at the location of the facility. A city or county has the power only to correct the second part of the Bureau's miscount – assigning people to the wrong location – and not the first part – failing to assign them to the correct location. Accordingly, some local redistricting authorities adjust population data, to the extent their jurisdiction permits, by removing incarcerated people from the population base for redistricting, because the Census Bureau incorrectly counted them as if they were residents of that location. *The Census Count and Prisoners: The Problem, the Solutions, and What the Census Can Do*, at 4 (Oct. 22, 2012) (statement of Ben Peck, Senior Legislative and Policy Associate, Demos), *available at* http://www.demos.org/sites/default/files/publications/BenPeck_Testimony_PrisonBasedGerrymandering101212.pdf. This data limitation with respect to incarcerated persons in no way suggests that non-voters should be disregarded in redistricting, when such persons have close ties to the community where they are actually counted and cannot even theoretically be counted at some other location by the Census Bureau.

III. THE PROBLEM OF PRISON GERRYMANDERING MAY IMPLICATE EQUAL PROTECTION CONCERNS, BUT THOSE CONCERNS IN NO WAY SUPPORT APPELLANTS' ARGUMENT FOR A CONSTITUTIONAL RULE EXCLUDING NON-VOTERS IN REDISTRICTING.

The problem of prison gerrymandering may implicate Equal Protection concerns in some circumstances. *See Davidson v. City of Cranston*, 42 F. Supp. 3d 325 (D. R.I. 2014). These Equal Protection concerns, however, in no way support the relief sought by Appellants in this case.

Appellants contend that the Fourteenth Amendment requires the Court to choose between two competing theories of equality under the Fourteenth Amendment – electoral equality and representational equality – and to invalidate a state's choice of representational equality if it conflicts with the goal of electoral equality. Under an electoral theory of equality, the Fourteenth Amendment is argued to protect the rights only of eligible voters and thus to require states to equalize the numbers of voters in each district.[21] Under a representational theory of equality, the Fourteenth Amendment is argued to have a broader scope that protects the rights of all persons, and thus to require states to equalize the numbers of persons in each district – without regard to often

---

[21] Br. for Appellants 26.

temporary or changing circumstances such as whether the person is eligible or registered to vote.[22]

Amici believe that the arguments for representational equality are much stronger than those for equality based on eligible voters,[23] but do not wish to duplicate the arguments being made by other amici on that score. In this brief, amici seek only to underscore the point that the practice of prison gerrymandering cannot be justified under either theory of representation. Accordingly, the arguments for reforming prison gerrymandering in no way require the Court to embrace Appellants' demand that electoral equality must be the sole touchstone for implementing the Fourteenth Amendment's one-person, one-vote requirement.

This point is well explained in *Davidson v. City of Cranston*. In *Davidson*, city residents are challenging a redistricting plan for city and school committee districts in Cranston, Rhode Island, which assigns the adult incarcerated population of the ACI in Rhode Island as "residents" of one ward in the City of Cranston. As noted by the district court in denying a motion to dismiss, "the case now before this Court

---

[22] *Garza v. County of Los Angeles*, 918 F.2d 763, 773-74 (9th Cir. 1990).

[23] All federal appellate courts that have been asked to enshrine electoral equality above representational equality have ruled that the Fourteenth Amendment does not support that demand. *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996); *Garza*, 918 F.2d 763.

presents an alleged set of circumstances that appears to be justified by neither the principle of electoral equality nor of representational equality." *Id.* at 331. The court's opinion pointed out that, assuming Plaintiffs' allegations are true, "[c]learly, the inclusion of the ACI prison population is not advancing the principle of electoral equality because the majority of prisoners, pursuant to the State's Constitution, cannot vote, and those who can vote are required by State law to vote by absentee ballot from their pre-incarceration address." *Id.* Given the complaint's allegations that the incarcerated persons are unable to interact with elected officials or with the community where they are counted in any meaningful way, the court further noted that "the prisoners' inclusion in Ward Six does nothing to advance the principle of representational equality." *Id.*[24]

The *Davidson* ruling underscores that solving the problem of prison gerrymandering does not require the federal courts to choose an electoral theory of equality in preference to a representational theory of

---

[24] Surprisingly, one amicus brief supporting Appellants cites the *Davidson* decision as if it supports an argument requiring a rule of electoral equality in redistricting. Br. of the City of Yakima, Washington as Amicus Curiae Supp. Appellants, at 14 n.19. As the above discussion confirms, this is a complete misreading of the decision, which directly rejects the argument that reforming prison gerrymandering requires a court to choose between electoral equality and representational equality. This no doubt explains why the Appellants do not rely on *Davidson* as supporting their claims in this case.

equality. Reforming the practice of prison gerrymandering involves resolving the question of *where* incarcerated persons – whether or not they are eligible to vote – should be counted for purposes of redistricting under either an electoral or representational theory of equality. It certainly does not justify a constitutional rule elevating the goal of electoral equality above that of representational equality.

* * *

As noted in the Summary of Argument, amici are well aware that this case does not directly address the rationality or constitutionality of prison gerrymandering. The modest purpose of this brief is simply to explain that Appellants are relying on false parallels to the extent they invoke the problem of prison gerrymandering as supporting their argument for a Fourteenth Amendment rule excluding non-citizens or non-voters from the population base for redistricting.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

BRENDA WRIGHT
Counsel of Record
ADAM LIOZ
SCOTT NOVAKOWSKI
DEMOS
358 Chestnut Hill Ave.,
Suite 303
Brighton, MA 02135
(617) 232-5885
bwright@demos.org

PETER WAGNER
ALEKS KAJSTURA
PRISON POLICY INITIATIVE
P.O. Box 127
Northampton, MA 01061
(413) 527-0845
pwagner@prisonpolicy.org

Counsel for Amici Curiae

September 25, 2015

No. 14-940

In the Supreme Court of the United States

SUE EVENWEL, *ET AL.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *ET AL.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF APPELLANTS

LAWRENCE J. JOSEPH
1250 CONNECTICUT AVE. NW
SUITE 200
WASHINGTON, DC 20036
(202) 355-9452
ljoseph@larryjoseph.com

Counsel for Amicus Curiae

QUESTIONS PRESENTED

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that the Equal Protection Clause of the Fourteenth Amendment includes a "one-person, one-vote" principle. This principle requires that, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970). In 2013, the Texas Legislature enacted a State Senate map creating districts that, while roughly equal in terms of total population, grossly malapportioned voters. Appellants, who live in Senate districts significantly overpopulated with voters, brought a one-person, one-vote challenge, which the three-judge district court below dismissed for failure to state a claim. The district court held that Appellants' constitutional challenge is a judicially unreviewable political question.

The question presented is whether the "one-person, one-vote" principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

TABLE OF CONTENTS

Pages

Questions Presented i
Table of Contents ii
Table of Authorities iii
Interest of *Amicus Curiae* 1
Statement of the Case 2
Constitutional Background 4
Factual Background 6
Summary of Argument 7
Argument 8
I. This Court's One-Person, One-Vote Reading of the Equal Protection Clause Requires Equality Based on Citizenship 8
A. Strict Scrutiny Applies to Laws that Deny Equal Protection in Voting 8
B. This Court's Prior One-Person, One-Vote Holdings Do Not Expressly Resolve the Issues Raised Here 10
C. The Reasoning of this Court's One-Person, One-Vote Decisions Compels a Citizen-Based Metric 14
II. The Proffered Reasons to Deny Relief to Citizens All Lack Merit 16
A. This Dispute Is Reviewable 16
B. The First Amendment's Right of Petition Does Not Guarantee an Equally Familiar Audience 19
C. The Analogy to Apportionment for the U.S. House of Representatives Is Inapposite 21
Conclusion 22

TABLE OF AUTHORITIES

Pages

Cases

Baker v. Carr,
369 U. S. 186 (1962) 17, 18

Bartlett v. Strickland,
556 U.S. 1 (2009) 18

Bd. of Estimate v. Morris,
489 U.S. 688 (1989) 15

Brown v. Thomson,
462 U.S. 835 (1983) 4-5

Brushaber v. Union Pac. R. Co.,
240 U.S. 1 (1916) 21

Burns v. Richardson,
384 U.S. 73 (1966) 6, 7, 10-12, 14, 21

Bush v. Vera,
517 U.S. 952 (1996) 17

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 20

Chapman v. Meier,
420 U.S. 1 (1975) 17

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2000) 21

Chen v. City of Houston,
532 U.S. 1046 (2001) 5

City of Boerne v. Flores,
521 U.S. 507 (1997) 19

Cooper Indus., Inc. v. Aviall Serv., Inc.,
543 U.S. 157 (2004) 13

Doe v. Braden,
57 U.S. (16 How.) 635 (1854) 18
Dunn v. Blumstein,
405 U.S. 330 (1972) 15
Evenwel v. Abbott,
135 S.Ct. 2349 (2015) 16
Evenwel v. Perry,
No. A-14-CV-335-LY-CH-MHS
(W.D. Tex. Nov. 5, 2014) 10
Flast v. Cohen,
392 U.S. 83 (1968) 13-14
Frank v. Walker,
768 F.3d 744 (7th Cir. 2014) 9
Gaffney v. Cummings,
412 U.S. 735 (1973) 10-11
Garza v. Cty. of Los Angeles,
918 F.2d 763 (9th Cir. 1990) 19
Gray v. Sanders,
372 U.S. 368 (1963) 4, 15
Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo., 397 U.S. 50 (1970) 12, 15
Harper v. Virginia State Bd. of Elections,
383 U.S. 663 (1966) 9
Kadrmas v. Dickinson Pub. Sch.,
487 U.S. 450 (1988) 9
Mahan v. Howell,
410 U.S. 315 (1973) 5
Minn. State Bd. for Cmty. Colleges v. Knight,
465 U.S. 271 (1984) 20
Mistretta v. U.S.,
488 U.S. 361 (1989) 14

Oetjen v. Central Leather Co.,
246 U.S. 297 (1918) 18

Perry v. Perez,
132 S.Ct. 934 (2012) 12

Powell v. McCormack,
395 U.S. 486 (1969) 18, 19

Reynolds v. Sims,
377 U.S. 533 (1964) 2-5, 12, 15, 21

Steel Co. v. Citizens for a Better Environment,
523 U.S. 83 (1998) 16

U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973) 5, 17

Univ. of Texas v. Camenisch,
451 U.S. 390 (1981) 16

Vieth v. Jubelirer,
541 U.S. 267 (2004) 17

Waters v. Churchill,
511 U.S. 661 (1994) 13

Wesberry v. Sanders,
376 U.S. 1 (1964) 9

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 9

Statutes

U.S. CONST. amend. I 7-8, 16, 19-21

U.S. CONST. amend. XIV 4, 17

U.S. CONST. amend. XIV, §1, cl. 4 ..... 2, 4, 8-11, 20-21

28 U.S.C. §1331 17

TEX. CONST. art. III, §25 (2000) 19

Rules, Regulations and Orders

S. Ct. Rule 37.6 1

Other Authorities

MERRIAM-WEBSTER ONLINE DICTIONARY (2015)..... 3

No. 14-940

In the Supreme Court of the United States

SUE EVENWEL, *ET AL.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *ET AL.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit corporation headquartered in Saint Louis, Missouri. Since its founding, Eagle Forum has consistently defended the Constitution's federalist structure. In the context of the integrity of the elections on which the Nation has based its political community, Eagle Forum has supported efforts both to ensure equality

[1] *Amicus* Eagle Forum files this brief with the consent of all parties; Petitioners' and Respondents' written letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

of voters consistent with the written Constitution and validly enacted laws. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Appellants Sue Evenwel and Edward Pfenninger (collectively, "Appellants") sued the Governor and Secretary of State of Texas (collectively, "Texas") to void the recently reapportioned Texas state senate districts as violating this Court's one-person, one-vote principle under the Equal Protection Clause. In creating its new districts, Texas sought to – and did approximately – equalize those districts according to the total census population, which includes citizens and non-citizens. In doing so, however, Texas created a disparity in citizen voting strength between the predominantly rural districts with relatively few non-citizen residents and the predominantly urban districts with relatively larger populations of non-citizen residents.

When this Court's one-person, one-vote rulings began approximately fifty years ago, the effect of its holdings was to pry entrenched political power from predominantly rural districts. That power had grown inversely proportional to relative population as the cities grew from urbanization in the late 1800s and early to mid-1900s. As this Court memorably explained, "Legislators represent people, not trees or acres." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). Now, due primarily to an unevenly distributed influx of non-citizens in urban areas, the disproportionately entrenched power lies predominantly in cities, which recalls that *Reynolds* ruled for *equality*, not cities:

"Legislators are elected by voters, *not farms or cities*." *Id.* (emphasis added). This case requires the Court to re-commit itself to equality.

The parties divide over the appropriate metric for voter equality: the census "population" that Texas used versus citizen voting-age population ("CVAP") favored by Appellants. There are too many alternate *populations* for the term "population" to have a precise meaning here (*e.g.*, including or excluding felons, non-residents who happen to have been present for the census, those too young to vote, etc.). Indeed, "population" is defined as "a body of persons or individuals having a *quality or characteristic* in common," MERRIAM-WEBSTER ONLINE DICTIONARY (2015) (emphasis added), which simply begs the question of what characteristics define those whom the "population" includes. However Texas chooses to permissibly resolve any *other* issues such as felons' voting rights, only one choice is relevant here: do non-citizens count? For that reason, *amicus* Eagle Forum respectfully submits that the choice presented here is between CVAP and *VAP* (*i.e.*, voting-age population, without regard to citizenship). When presented in those stark terms, the very rationale of this Court's one-person, one-vote jurisprudence compels basing voting equality on the citizens who hold that franchise.

On remand, the available data and computer models make it likely that Texas could define new senate districts that would satisfy this Court's test for voting equality (*i.e.*, up to 10% discrepancies) for both CVAP and VAP, if Texas wishes to do so. The possibility of that future prerogative of Texas cannot,

however, prevent this Court's resolving the purely legal threshold question of what metrics permissibly may apply to the equal-protection issue in the senate districts currently before this Court.

Constitutional Background

Under the Fourteenth Amendment, "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws," U.S. CONST. amend. XIV, §1, cl. 4, which – in the electoral apportionment context – this Court has held to require that each citizen voter have an approximately equal say in the outcome of elections:

> "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote."

Reynolds, 377 U.S. at 558 (*quoting Gray v. Sanders*, 372 U.S. 368, 381 (1963)). This one-person, one-vote principle is the animating feature of this Court's apportionment jurisprudence since the 1960s.

Refining the principle over that interval, the Court has made clear that deviations under ten percent in the relative strength of electors' votes do not state a *prima facie* equal-protection violation. *Brown v. Thomson*, 462 U.S. 835, 842 (1983).[2] On the

---

[2] The Court has allowed this deviation from ideal equality not only due to the available granularity and power of statistical and computing methods when the Court was writing its decisions but also to allow states to incorporate other legitimate other interests (*e.g.*, geographical compactness of boundaries, integrity of political subdivisions) in legislative

other hand, deviations nearing twenty percent are *per se* unconstitutional. *Mahan v. Howell*, 410 U.S. 315, 329 (1973). The more difficult disputes have involved disparities that fall between ten and twenty percent. As the precision of these percentage bounds for acceptable deviations make clear, the equal-protection rights encompass not only the denial of the right to vote but also the dilution of the franchise, *vis-à-vis* other voters:

> [T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Reynolds, 377 U.S. at 555; *cf. U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (courts "have allowed important interests to be vindicated by plaintiffs with no more at stake ... than a fraction of a vote").

While it has thus addressed the permissible bounds of apportionment algebra with admirable – if somewhat arbitrary – precision, the Court has not defined the most basic variable in the equation: the "measure of population [that] should be used for determining whether the population is equally distributed among the districts." *Chen v. City of Houston*, 532 U.S. 1046, 1047 (2001) (Thomas, J., dissenting from denial of *certiorari*). Because the rate of voter registration potentially might incorporate an

---

districts. *See Reynolds*, 377 U.S. at 577-79; *Brown*, 462 U.S. at 842. Today's statistical and computing tools make the former concern irrelevant.

element of past discrimination or temporal anomalies, *Burns v. Richardson*, 384 U.S. 73, 95-96 & nn.25-26 (1966), the two potential metrics that present themselves are the VAP used by Texas and the CVAP proffered by Appellants. As indicated by the two acronyms – VAP and CVAP – the difference dividing the parties is whether citizenship counts.

Factual Background

Appellant Evenwel lives and votes in Texas Senate District 1, which has 573,895 citizens of voting age. Appx. 28a. Appellant Pfenninger lives and votes in Texas Senate District 4, which has 533,010 citizens of voting age. *Id.* at 30a. Using the same metric, a Texas senate district had 372,420 citizens of voting age. *Id.* at 28a, 30a. Thus, because Texas sought to equalize its senate districts on VAP, not on CVAP, the Appellants' senate districts have much more citizens of voting age than the senate district with the fewest citizens of voting age, *id.*, which equates to devaluing Appellants' votes by approximately 1:1.54 and 1:1.43, respectively, *vis-à-vis* the votes of Texas citizens in the senate district with the smallest CVAP count. *Id.* This discrepancy is entirely unsurprising, given the higher non-citizen populations in predominantly urban areas and Texas's effort to equalize voting strength on the basis of VAP.

Neither the legislative facts nor the adjudicative facts are materially in dispute: using VAP as a metric for state senate districts skews the voting strength of predominantly urban districts with high non-citizen populations to the disadvantage of rural districts with lower non-citizen populations. This

litigation is therefore an appropriate vehicle for deciding the merits of the questions presented: which population – VAP or CVAP – governs the equal-protection apportionment issues.

SUMMARY OF ARGUMENT

Because the franchise is a fundamental right that is protective of all other rights, strict scrutiny applies to this Court's evaluating Appellants' claims (Section I.A). As explained in *Burns*, this Court has reserved the question presented here between the CVAP and VAP metrics; indeed, no prior case has presented a justiciable case or controversy in which the Court *could have* even purported to resolve that issue – namely, an actionable CVAP disparity without an actionable VAP disparity – without issuing an advisory opinion (Section I.B). On the merits, while some of the Court's one-person, one-vote rulings relied on VAP, they did so only because that readily available census data was not materially different from the true measure of voter equality (namely, citizenship), which is the very essence of all of the Court's one-person, one-vote holdings (Section I.C).

In addition to Appellants' being correct on the merits of voter equality, none of the countervailing arguments have merit. First, as demonstrated by the Court's seminal voting-rights cases, this litigation does not present a non-justiciable question (Section II.A). Second, the argument that the right of petition under the First Amendment provides non-citizens a right to equal, population-based access to legislators is fanciful because – in addition to being contrary to *Burns* – the proposed right does not exist in the First

Amendment, which guarantees the right to *petition* without imposing any affirmative obligation on the legislature to listen or to respond and without undermining citizens' equal-protection rights in the voting context (Section II.B). Third, and analogously to the political-question analysis, this Court's state apportionment cases have squarely rejected the analogy to census-based apportionment in the federal Constitution, which was the result of a compromise among the sovereign states in forming this Nation and not something that the Framers intended to adopt at the state level (Section II.C).

ARGUMENT

I. THIS COURT'S ONE-PERSON, ONE-VOTE READING OF THE EQUAL PROTECTION CLAUSE REQUIRES EQUALITY BASED ON CITIZENSHIP

In safeguarding the equal-protection right to vote, the Constitution necessarily protects the right-holding class: namely, citizens. Non-citizens cannot vote, and they therefore lack an equal-protection right in this dispute. That result follows from not only the Constitution itself but also from this Court's reasoning in the one-person, one-vote decisions. In any event, the right to vote is fundamental, and states cannot abridge – that is dilute – the right to vote without a compelling need and narrow tailoring.

A. Strict Scrutiny Applies to Laws that Deny Equal Protection in Voting

Before analyzing whether Texas's apportionment laws violate the Equal Protection Clause, this Court first should analyze the constitutional scrutiny that applies here. Because voting is a fundamental right

in our democracy, *amicus* Eagle Forum respectfully submits that the Court must apply strict scrutiny.

First, "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("the right to vote is too precious, too fundamental to be so burdened or conditioned").[3] As such, "the political franchise of voting ... is regarded as a fundamental political right, because [it is] preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("[o]ther rights, even the most basic, are illusory if the right to vote is undermined"); *cf. Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) (deeming "equality of the franchise" a "fundamental right" that "should trigger strict scrutiny"). Appellants' equal-protection voting-rights claims therefore raise a question of the denial of their fundamental rights.

When equal-protections claims seek to defend a fundamental right (or protect against discrimination on the basis of a suspect classification), this Court reviews the challenged law under strict scrutiny. *See Kadrmas*, 487 U.S. at 458. The Texas law here

---

[3] Although *Harper* is a voter-access case, and the holdings in voter-access cases do not follow the same analyses as vote-dilution cases, *see Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014) (*citing Ohio State Conference of NAACP v. Husted*, 768 F.3d 524 (6th Cir. 2014) *and League of Women Voters of North Carolina v. North Carolina*, 769 F.3d 224 (4th Cir. 2014)), the fundamental nature of the voting right transcends those two categories.

cannot survive that scrutiny because Texas easily could have created compliant senate districts on the basis of citizenship (*i.e.*, CVAP), and it could have done so while also keeping VAP under ten-percent discrepancies, if that form of non-required equality matters to Texas.

B. This Court's Prior One-Person, One-Vote Holdings Do Not Expressly Resolve the Issues Raised Here

As the district court acknowledged, this "Court has never held that a certain metric (including total population) *must* be employed as the appropriate metric." Appx. at 8a (emphasis in original). Indeed, in most cases, the Court has used total population (*i.e.*, VAP), *id.* at 7a, although the Court allowed the use of registered voters over that metric in *Burns*. By way of partial explanation, no case previously has reached this Court where the impermissibility of using a VAP metric over CVAP was both *relevant* and contested – *i.e.*, where the CVAP discrepancy was alleged or held to exceed 10% and the VAP discrepancy did not.

Deviation between CVAP and VAP is not *theoretically* new to the Court, which long ago made clear that "total population ... is ... not a talismanic measure of the weight of a person's vote," in part because "'census persons' are not voters" and the percentages of age-eligible voters vary between districts. *Gaffney v. Cummings*, 412 U.S. 735, 746-47 (1973) ("if it is the weight of a person's vote that matters, total population ... may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment,

because 'census persons' are not voters"). In *Gaffney*, however, the highest discrepancy was eight percent and thus deemed minor. *Id.* at 751. In *Burns*, the Court recognized that states *need not* count ineligible voters,[4] without having been presented with the opposite scenario of counting such ineligible-voter populations to the point of significantly debasing eligible voters' franchise:

> [T]his Court [has never] suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured.

Burns, 384 U.S. at 92. As the Court explained, "[t]he decision to include or exclude any such group involves choices about the nature of representation with which *we have been shown no constitutionally founded reason to interfere.*" *Id.* (emphasis added). In all of the Court's cases to date, the Court essentially has preserved the issue, either expressly by stating so, *Burns*, 384 U.S. at 91, or impliedly by not having been presented with a case or controversy in which the difference had constitutional significance. *Id. at* 92 ("[u]nless a choice is one the Constitution forbids, the resulting apportionment base offends no

---

[4] In *Burns*, this Court upheld Hawaii's use of registered voters to apportion its legislative districts to equalize citizen voting strength by omitting the military personnel and tourists who skewed the census data to Oahu. 384 U.S. at 94.

constitutional bar"); *Perry v. Perez*, 132 S.Ct. 934, 942 (2012) ("[i]n the absence of any legal flaw ... in the State's plan, the District Court had no basis to modify that plan"). *Amicus* Eagle Forum respectfully submits that only now, with an actual discrepancy of constitutional relevance between CVAP and VAP before the Court, are the issues raised here – namely, whether CVAP deviations violate the one-person, one-vote principle – before the Court.

To be sure, rationales exist in the Court's decisions that support requiring use of CVAP when the two metrics diverge: "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that *equal numbers of voters* can vote for proportionally equal numbers of officials." *Hadley*, 397 U.S. at 56 (emphasis added).[5] And the Court already has *allowed* states to ignore VAP if it would result in "a substantially distorted reflection of the distribution of *state citizenry*." *Burns*, 384 U.S. at 94. Taking this Court at its word, however, the seminal decisions "carefully left open the question what population was being referred to," even while relying predominantly on VAP as the most convenient metric. *Id.* at 91. Outside of *Burns* itself, however, this Court has not heard cases in

---

[5] On the other hand, the Court's one-person, one-vote decisions also include language that, taken out of context, might support the use of *population:* "The overriding objective must be *substantial equality of population* among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *See Reynolds*, 377 U.S. at 579 (emphasis added).

which VAP differed meaningfully from CVAP. In sum, the Court has not yet affirmatively addressed the issues presented.

Because the Court has not previously addressed the CVAP-versus-VAP issue directly, the Court has not yet *decided* that issue directly: "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Serv., Inc.*, 543 U.S. 157, 170 (2004) (interior quotations omitted). Simply put, "cases cannot be read as foreclosing an argument that they never dealt with." *Waters v. Churchill*, 511 U.S. 661, 678 (1994). While *amicus* Eagle Forum respectfully submits that the rationale for the Court's various one-person, one-vote holdings supports the CVAP reading, see Section I.C, *infra*, the fact remains that the Court has not yet expressly decided the question.

Indeed, that the Court has not decided this question already should be plain from the absence of any prior case that presented the issue squarely by having an actionable CVAP disparity without an actionable VAP disparity. *Amicus* Eagle Forum respectfully submits that a majority ruling for Appellants should emphasize the lack of a prior *opportunity* for this Court even to reach his issue:

> [T]he Article III prohibition against advisory opinions reflects the complementary constitutional considerations expressed by the justiciability doctrine: Federal judicial power is limited to those disputes which confine federal courts to a

> role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process.

Flast v. Cohen, 392 U.S. 83, 97 (1968); *Mistretta v. U.S.*, 488 U.S. 361, 385 (1989). If Appellants – and thus predominantly rural voters – prevail, those that lose their unfairly entrenched political power will no doubt lash out in the press against this Court's departure from its precedents. *Amicus* Eagle Forum respectfully submits that the Court's decision should make clear to anyone even nominally informed on these issues that such claims are pure sophistry. There is no controlling prior precedent on the issue because the Court has not had to confront it squarely before this case.

C. The Reasoning of this Court's One-Person, One-Vote Decisions Compels a Citizen-Based Metric

As indicated in Section I.B, *supra*, this Court in *Burns* acknowledges the use of VAP as a convenient and ready census metric in most of its one-person, one-vote decisions, but nonetheless has held open the question on the relevant metric. 384 U.S. at 91. With an actual case or controversy before it that pits CVAP against VAP, the time has finally come for this Court to resolve the issue. *Amicus* Eagle Forum respectfully submits that only CVAP fairly preserves the essential equality of voters across districts, which is the very essence of this Court's one-person, one-vote jurisprudence:

> The concept of "we the people" under the Constitution visualizes *no preferred class*

> *of voters but equality among those who meet the basic qualifications.* The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

Gray, 372 U.S. at 379-80 (emphasis added); *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("a *citizen* has a constitutionally protected right to participate in elections on an *equal basis with other citizens* in the jurisdiction"); *Hadley*, 397 U.S. at 56 (quoted *supra*); *Reynolds*, 377 U.S. at 562-63 (states cannot constitutionally inflate or dilute "the votes of citizens"). Because the franchise belongs to citizens, so too does the equal-protection right.

"In calculating the deviation among districts, the relevant inquiry is whether 'the vote of any *citizen* is *approximately equal in weight to that of any other citizen.*'" *Bd. of Estimate v. Morris*, 489 U.S. 688, 701 (1989) (*quoting Reynolds*, 377 U.S. at 579) (emphasis added). This Court must reaffirm that "[w]eighting the *votes of citizens* differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." *Reynolds*, 377 U.S. at 563. Accordingly, this Court must hold that when the CVAP and VAP metrics diverge – as they do here – the one-person, one-vote principle requires reviewing courts to protect the voting rights of *citizens*, not of trees or farms, but also not of non-citizens, cities, buildings, or beltways.

II. THE PROFFERED REASONS TO DENY RELIEF TO CITIZENS ALL LACK MERIT

Given that this Court has not yet directly decided the question presented here, *amicus* Eagle Forum refutes three bases that the lower courts have used to reject using a CVAP metric in apportionment and voting rights cases. As explained in the following three sections, the issues raised here are justiciable and neither the First Amendment right of petition nor the federal Constitution's apportioning House seats on the census provides a barrier to using CVAP metrics in state apportionment cases.

A. This Dispute Is Reviewable

In the initial briefing of this case, Texas argued that this litigation presents non-justiciable political questions, which Appellants dispute. *See* Appellants' Br. at 29-37. While concurring with all of Appellants' arguments, *amicus* Eagle Forum here emphasizes that none of this Court's tests for non-justiciability apply. Moreover, although this Court has noted *probable* jurisdiction, *Evenwel v. Abbott*, 135 S.Ct. 2349 (2015) ("probable jurisdiction noted"), that is not the same thing as *actual* jurisdiction. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) (likelihood of prevailing is not the same thing as prevailing). Given an appellate court's obligation first to ensure itself of its jurisdiction, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 (1998), this Court should conclusively resolve the jurisdictional question.

The primary potential obstacle to jurisdiction is the political-question doctrine,[6] for which this Court has identified six independent criteria for non-justiciability in the voting-rights context:

> "[1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

Vieth v. Jubelirer, 541 U.S. 267, 277-78 (2004) (*quoting Baker*, 369 U.S. at 217, alterations in *Vieth*). In this section, *amicus* Eagle Forum demonstrates that none of these criteria are met here.

---

[6] Appellants obviously have standing, *Bush v. Vera*, 517 U.S. 952, 958 (1996) ("a plaintiff [who] resides in a [malapportioned] district ... has been denied equal treatment ... and therefore has standing"); *Chapman v. Meier*, 420 U.S. 1, 24 (1975) ("citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group"); *SCRAP*, 412 U.S. at 689 n.14 (quoted *supra*), and Appellants raise federal questions under the Fourteenth Amendment. 28 U.S.C. §1331; *Baker v. Carr*, 369 U.S. 186, 199 (1962).

First, the question whether the Constitution commits issues "to a coordinate political department" references the relationship between the federal judiciary and the *federal* legislature and executive. *See Baker*, 369 U.S. at 210-11 (non-justiciability issue "primarily [is] a function of the separation of powers," based on whether the Constitution "demonstrably commit[s] [an issue] to the [federal] executive or legislature"); *Powell v. McCormack*, 395 U.S. 486, 518 (1969) ("political questions are not justiciable primarily because of the separation of powers *within* the Federal Government") (emphasis added). For example, courts lack the authority to second-guess foreign affairs beyond complying with the Constitution. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918) ("conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative – "the political" – Departments of the Government"); *Doe v. Braden*, 57 U.S. (16 How.) 635, 657 (1854). Nothing commits the issue of state apportionment to other branches of the federal government.

Second and third, the equal-protection basis for the Court's one-person, one-vote holdings clearly constitute "judicially discoverable and manageable standard" that rest on grounds not "clearly for nonjudicial discretion." Even if CVAP data were not readily available, those data still would remain discoverable and manageable. *Bartlett v. Strickland*, 556 U.S. 1, 32-33 (2009) (Souter, J., dissenting). This Court has inserted itself into state appropriation issues, so it can hardly withdraw now. Indeed, but for judicial intervention into state apportionment,

Texas would still apportion "Senatorial Districts ... according to the number of qualified electors." TEX. CONST. art. III, §25 (2000). Accordingly, the second and third justiciability criteria are met.

Fourth, because no "coordinate branches of the [*federal*] government" have a say on this issue, this Court cannot "express[] lack of the respect due coordinate branches of the government" in deciding this case. *Powell*, 395 U.S. at 518 (quoted *supra*). As a consequence, the fourth justiciability criterion is met as well.

Fifth and sixth, this case presents neither the "unusual need for unquestioning adherence" to prior decisions nor a risk of "multifarious pronouncements by various departments on one question." On the constitutional issues raised here, this Court is the final, exclusive arbiter. *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997) ("[t]he power to interpret the Constitution ... remains in the Judiciary"). As such, the other governmental departments have not opined on the issues presented here, and the final two justiciability criteria are met.

B. The First Amendment's Right of Petition Does Not Guarantee an Equally Familiar Audience

The Ninth Circuit has rejected CVAP-based voting districts on the theory that districts with large non-citizen populations would be denied equal access to an elected representative in violation of the First Amendment right of petition, as compared to the access enjoyed by voting districts with fewer non-citizen residents. *Garza v. Cty. of Los Angeles*, 918 F.2d 763, 774-75 (9th Cir. 1990). The Ninth Circuit's

concern for non-citizens is misplaced because there is no First Amendment right of *per capita* equal access.

The First Amendment provides the right to *petition* government to redress grievances. U.S. CONST. amend. I. It does not concern itself with how many other people or entities – either citizen or non-citizen – share that right *vis-à-vis* any particular government actor or entity. Although it protects the right of petition, "the First Amendment does not impose any affirmative obligation on the government to listen [or] to respond." *Minn. State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271, 286 (1984). Indeed, "[n]othing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." *Id.* at 285. Under the circumstances, the Ninth Circuit's proposed right of equal access – in the form of a proportionately familiar member of an elected body – does not exist.[7]

Quite to the contrary, the right of petition "does not necessarily give ... immunity from the [other] laws," but "may not be used as the means or the pretext for achieving 'substantive evils' which the legislature has the power to control." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972) (citations omitted). While *California Motor Transport* concerned antitrust law, its holding applies equally – even more so – to Equal Protection

---

[7] As Appellants explain (Appellants' Br. at 40), the Ninth Circuit relied on cases that protect the right of petition from an unreasonable *restraint*. Nothing in Appellants' requested relief would *restrain* anyone from petitioning government anywhere.

Clause: "the Constitution does not conflict with itself by conferring, upon the one hand, [one] power, and taking the same power away, on the other, by the limitations of [another] clause." *Brushaber v. Union Pac. R. Co.*, 240 U.S. 1, 24 (1916). In other words, the right of petition cannot suppress a citizen's rights under the Equal Protection Clause and this Court's one-person, one-vote rulings.[8]

C. The Analogy to Apportionment for the U.S. House of Representatives Is Inapposite

The Fifth Circuit previously has rejected CVAP-based voting districts on the theory that allocating federal House seats on the basis of the census (which includes non-citizens) undermines the use of CVAP metrics for state elections. *Chen v. City of Houston*, 206 F.3d 502, 527 (5th Cir. 2000). As this Court's one-person, one-vote decisions have long held, however, the compromise that the sovereign states made in forming a union after winning independence from Great Britain does not render the Equal Protection Clause inapplicable to apportionment cases *within* the states.

That a court would accept such an argument is remarkable, given that "[a]ttempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements." *Reynolds*. 377 U.S. at 573. As this Court explained,

---

[8] If the First Amendment requires using VAP to protect non-citizens' rights, this Court wrongly decided *Burns*, which allowed the use of registered voters over the census.

the Founders did not intend the federal apportionment compromise to establish a norm for state apportionment:

> The original constitutions of 36 of our States provided that representation in both houses of the state legislatures would be based completely, or predominantly, on population. And the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted. Demonstrative of this is the fact that the Northwest Ordinance, adopted in the same year, 1787, as the Federal Constitution, provided for the apportionment of seats in territorial legislatures solely on the basis of population.

Id. In short, there is no basis for finding the "so-called federal analogy," *id.* at 572, to hold any weight here.

CONCLUSION

For the foregoing reasons and those argued by Appellants, the Court should hold that – given the disparity between VAP and CVAP in the Senate districts – Texas's allocation of voting rights based on VAP violates the equal-protection rights of citizens.

August 7, 2015

Respectfully submitted,

Lawrence J. Joseph
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
(202) 355-9452
lj@larryjoseph.com

Counsel for *Amicus Curiae*

Supreme Court, U.S.
FILED
SEP 25 2015
OFFICE OF THE CLERK

No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, *ET AL.*,
Appellants,
v.
GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF TEXAS, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF FORMER DIRECTORS OF THE U.S. CENSUS BUREAU AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

J. Gerald Hebert
Trevor Potter
CAMPAIGN LEGAL CENTER
1411 K St. NW, Suite 1400
Washington, DC 20005
(202) 736-2200

Anita S. Earls
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 W. Highway 54, Suite 101
Durham, NC 27707
(919) 794-4198

Paul M. Smith
Jessica Ring Amunson
Counsel of Record
Mark P. Gaber
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

September 25, 2015

Counsel for *Amici Curiae*

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. States Redistrict Based Upon Decennial Census Data that Counts the "Whole Number of Persons" in Each State and There Is No Count of "Citizens" by the Decennial Census. 7

A. Legal Framework and History of the Census. . 7

B. States Rely on Census Data to Redistrict. 11

II. Serious Practical Concerns Counsel Against Constitutionally Requiring States to Draw Districts with Equal Numbers of Voting Age Citizens. 13

A. ACS Citizenship Estimates Cannot Provide the Basis For a Constitutional Equal Protection Rule. 13

1. The ACS Estimates Do Not Align with the Timing of Redistricting. 14

2. ACS Estimates Are Not Available at the Smallest Geographic Levels, and Some Data is Suppressed to Protect Privacy 17

3. As a Statistical Sample, ACS Estimates Are Subject to Error That Makes their Use for Line-Drawing Difficult. 19

B. Asking Citizenship Status of Every Household Would Lead to Reduced Response Rates and Inaccurate Responses, While Multiplying Privacy and Government Intrusion Fears. 23

III. Voter Registration Data Would Be an Inappropriate Measure Upon Which to Require Districts To Be Drawn. 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Board of Estimate of City of New York v. Morris, 489 U.S. 688 (1989) 11

Brown v. Thomson, 462 U.S. 835 (1983) 17

Burns v. Richardson, 384 U.S. 73 (1966) 27

Department of Commerce v. United States House of Representatives, 525 U.S. 316 (1999) 8, 9, 13

Georgia v. Ashcroft, 539 U.S. 461 (2003), *superseded by statute on other grounds as stated in Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015) .. 14, 15

Karcher v. Daggett, 462 U.S. 725 (1983) 12, 17, 22

League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006) 15

Reynolds v. Sims, 377 U.S. 533 (1964) 11

Valdespino v. Alamo Heights Indpendent School District, 168 F.3d 848 (5th Cir. 1999) 22

Wesberry v. Sanders, 376 U.S. 1 (1964) 11

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. art. II, § 1 25

U.S. Const. art. I, § 2 7

U.S. Const. amend. XIV, § 2 ..... 7, 8, 25

13 U.S.C. § 9(a)(1) 18

13 U.S.C. § 9(a)(2) 18

13 U.S.C. § 141(a) 8

13 U.S.C. § 141(b) 8

13 U.S.C. § 141(c) 12

13 U.S.C. § 195 8

Act of Aug. 31, 1964, Pub. L. No. 88-530, 78 Stat. 737 8

Act of Mar. 1, 1790, § 1, 1 Stat. 101 8

Act of Mar. 26, 1810, § 1, 2 Stat. 565-66 8

Ga. Const. art. 3, § 2 12

Ill. Const., art. 4, § 3(b) 12

N.J. Const. art. IV, § 2, ¶ 1 11

Pa. Const. art. 2, § 17(a) 11

Fla. Stat. § 11.031(1) 12

Ill. Comp. Stat., Chapter 55, § 2-3001c 12

LEGISLATIVE MATERIALS

Counting the Vote: Should Only U.S. Citizens be Included in Apportioning Our Elected Representatives?: Hearing Before Subcomm. on Federalism and the Census of the H. Comm. on Gov't Reform, 109th Cong. (2005) (Statement of Kenneth Prewitt). 24, 25

OTHER AUTHORITIES

Sandra L. Colby & Jennifer M. Ortman, U.S. Census Bureau, *Projections of the Size and Composition of the U.S. Population: 2014 to 2016* (Mar. 2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf 16

Andy Greenberg, *Census Paranoia Fueled Distrust in Government Privacy More than NSA Wiretapping*, Forbes, June 30, 2010, http://www.forbes.com/sites/firewall/2010/06/30/census-paranoia-fueled-distrust-in-government-privacy-more-than-nsa-wiretapping/ 23

Letter from Postmaster General Timothy Pickering to Secretary of State Thomas Jefferson, Dec. 26, 1793, http://founders.archives.gov/documents/Jefferson/01-27-02-0557 7

Catherine McCully, U.S. Census Bureau, *Designing P.L. 94-171 Redistricting Data for the Year 2020 Census* (Dec. 2014), http://www.census.gov/content/dam/Census/library/publications/2014/rdo/pl94-171.pdf 17

Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755 (2011) 16, 17

Pew Charitable Trust, *Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade* (Feb. 2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/PewUpgradingVoterRegistrationpdf.pdf 27

Kenneth Prewitt, *What if We Give a Census and No One Comes?*, 304 Sci. Mag. 1452 (June 4, 2004) 23

Prerana Swami, *Rep. Bachmann Refuses to Fill out 2010 Census*, CBS News (June 18, 2009), http://www.cbsnews.com/news/rep-bachmann-refuses-to-fill-out-2010-census/ 24

U.S. Census Bureau, *2010 Geographic Terms and Concepts*, https://www.census.gov/geo/reference/terms.html (last visited Sept. 23, 2015) 11

U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data* (Oct. 2008), https://www.census.gov/content/dam/Census/library/publications/2008/acs/ACSGeneralHandbook.pdf 10, 11

U.S. Census Bureau, *American Community Survey: Data Suppression* (Nov. 15, 2013), http://www2.census.gov/programssurveys/acs/tech_docs/data_suppression/ACSO_Data_Suppression.pdf 18

U.S. Census Bureau, *American Community Survey Design and Methodology (January 2014)*—Chapter 15: Improving Data Quality by Reducing Non-Sampling Error (Jan. 30, 2014), http://www2.census.gov/programssurveys/acs/methodology/design_and_methodology/acs_design_methodology_ch15_2014.pdf 19

U.S. Census Bureau, *American Community Survey Information Guide*, http://www.census.gov/acs/www/about_the_survey/acs_information_guide/flipbook/ 10

U.S. Census Bureau, Census Instructions, https://www.census.gov/history/www/through_the_decades/census_instructions/ (last visited Sept. 23, 2015) 7

U.S. Census Bureau, *Glossary: Confidence interval (American Community Survey*, https://www.census.gov/glossary/#term_ConfidenceintervalAmericanCommunitySurvey (last visited Sept. 23, 2015) 19

U.S. Census Bureau, Index of Questions, https://www.census.gov/history/www/through_the_decades/index_of_questions/ (last visited Sept. 23, 2015) 9

U.S. Census Bureau, Redistricting Data, *Voting Age Population by Citizen and Race (CVAP), 2009-2013 American Community Survey 5 Year Estimates*, https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html (last visited Sept. 23, 2015) 22

U.S. Census Bureau, *Summary File 3: 2000 Census of Population & Housing*—Chapter 8: Accuracy of the Data 8-3 (July 2007), https://www.census.gov/prod/cen2000/doc/sf3.pdf 9

INTERESTS OF *AMICI CURIAE*[1]

Amici curiae are former directors of the U.S. Census Bureau. As former directors responsible for administering the U.S. Census, *amici* have a unique and valuable perspective on the practical implications of the rule proposed by Appellants and the limitations of the data on which such a rule would necessarily rely. In *amici*'s view, serious practical concerns counsel against adopting Appellants' proposals to require states to draw districts with equal numbers of either voting age citizens or registered voters.

Amicus curiae Dr. Kenneth Prewitt was the Director of the U.S. Census Bureau from 1998 to 2001. In that capacity, he oversaw the execution of the 2000 decennial Census and development of the American Community Survey. Currently, Dr. Prewitt serves as the Carnegie Professor of Public Affairs and Special Advisor to the President at Columbia University, where he teaches and writes on issues related to the intersection of the Census, politics, and statistics. Prior to serving as Director of the Census, Dr. Prewitt served as Director of the National Opinion Research Center, President of the Social Science Research Council, and Senior Vice President of the Rockefeller Foundation. Dr. Prewitt has considerable knowledge and experience with the use and limitations of Census data and their effect on the political system.

---

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to the filing of *amicus* briefs are on file with the Clerk's office.

Amicus curiae Dr. Robert Groves was the Director of the U.S. Census Bureau from 2009 to 2012. During his tenure, he oversaw the 2010 decennial Census and implementation of the American Community Survey. Currently, Dr. Groves is the Executive Vice President and Provost of Georgetown University, where he also serves as a professor in the Math and Statistics Department as well as the Sociology Department. Prior to serving as Director of the Census Bureau, Dr. Groves was a professor at the University of Michigan and Director of its Survey Research Center, and before that a research professor at the University of Maryland's Joint Program in Survey Methodology. Dr. Groves has written extensively on the mode of data collection and its effect on responses, the social and political influences on survey participation, and the effect of privacy concerns on Census data collection. He has significant knowledge and experience related to the use and limitations of Census data and their effect on the political system.

Amicus curiae Dr. Martha Farnsworth Riche was the Director of the U.S. Census Bureau from 1994 to 1998. In that capacity, she oversaw the design of the 2000 decennial Census, as well as the new American Community Survey. Currently, Dr. Riche is affiliated with the Cornell Population Center at Cornell University, and participates in research projects with various Washington-based organizations, most recently on issues of demographic concern to the U.S. military. Prior to serving as Director of the Census Bureau, Dr. Riche directed policy studies for the Population Reference Bureau, and was a founding editor of American Demographics magazine. Dr. Riche has

considerable knowledge and experience with the use and limitations of Census data across the public, private, for profit, and not-for-profit sectors.

Amicus curiae Vincent P. Barabba was the Director of the U.S. Census Bureau from 1973 to 1976 and from 1979 to 1980—the only director to be appointed by presidents of both political parties. After serving as Director of the Census Bureau, Dr. Barabba was appointed by Presidents Reagan and George H.W. Bush to be the U.S. Representative to the Population Commission of the United Nations. He has also served on the board of directors for the Marketing Science Institute, the American Institutes for Research, and the National Opinion Research Center of the University of Chicago. In recognition of his performance in the private and public sectors he has received: An Honorary Doctorate of Laws degree from the Trustees of the California State University, been Inducted into the Market Research Council Hall of Fame, and was awarded The Certificate of Distinguished Service for Contribution to the Federal Statistical System from the Office of Management and Budget. Currently, Dr. Barabba is a member of the California Citizens Redistricting Commission. He has a demonstrated interest in both accurate population statistics and redistricting.

SUMMARY OF ARGUMENT

In order to comply with the equal protection principle of one-person, one-vote, nearly all states and jurisdictions redistrict using total population data based on counts from the most recent decennial U.S. Census. Appellants urge the Court to overthrow this long-settled practice and replace it with one of the two voter-based measures of population they propose—citizen voting age population or registered voters. Beyond the legal and policy flaws with Appellants' argument, serious practical concerns counsel against adopting either of their proposed metrics as a constitutionally mandated means of complying with the one-person, one-vote principle.

As an initial matter, there is no actual count of the number of voting age citizens. In keeping with the manner the Constitution provides for apportioning seats in the U.S. House of Representatives among the states, the Census Bureau counts the number of persons in each state. The Census Bureau does not count the number of citizens. The only voting age citizen data that exists are estimates based on a continual sampling conducted as part of the American Community Survey ("ACS") by the Census Bureau. But ACS was not designed with redistricting in mind. The timing of ACS estimates does not align with the timing of redistricting and ACS estimates are not reported at the small geographic levels redistricters normally use to build districts. Moreover, the geographic areas at which such estimates are available carry large error margins because of the small sample sizes. These factors make the ACS an inappropriate

source of data to support a constitutional rule requiring states to create districts with equal numbers of voting age citizens.

Nor is it possible to accurately obtain a count of voting age citizens by inquiring about citizenship status as part of the Census count. Recent experience demonstrates lowered participation in the Census and increased suspicion of government collection of information in general. Particular anxiety exists among non-citizens. There would be little incentive for non-citizens to offer to the government their actual status; the result would be a reduced rate of response overall and an increase in inaccurate responses. Both would frustrate the actual express obligation the Constitution imposes on the U.S. Census Bureau to obtain a count of the whole number of persons in order to apportion House of Representatives seats among the states.

Finally, Appellants' suggestion that voter registration data be used to draw districts is even more flawed. Studies show that the country's voter registration data is often inaccurate and outdated. And its inaccuracy aside, voter registration is, as this Court has already recognized, a fluctuating and political measure, making it generally a poor candidate for protecting a right to equal representation guaranteed by the Constitution.

Adequate data to support Appellants' positions simply do not exist. The district court's judgment should be affirmed.

ARGUMENT

A theory of how to determine equal protection for purposes of the one-person, one-vote principle is only as good as the data upon which it is built. Appellants urge the Court to adopt a constitutional rule that would require states to draw districts that have equal numbers of eligible voters rather than equal numbers of people. But the available data to implement such a requirement simply cannot bear the weight the Constitution requires. Indeed, such a requirement would in practice lead to serious equal protection violations because of the inherent uncertainty and fluctuation currently present in the various measures proposed by Appellants to tally eligible voters.[2] Moreover, there is strong reason to doubt sufficiently precise data could be obtained to ensure Appellants' theory of equal protection would ever be equal in practice.

An overview of the history and legal framework regarding population data aids in understanding the practical difficulties posed by Appellants' position.

---

[2] Indeed, as Appellants' own brief demonstrates, there is considerable fluctuation and uncertainty even among the multiple measures Appellant proposes as potential constitutional requirements. *See* Br. of Appellants at 9, 11-12.

I. States Redistrict Based Upon Decennial Census Data that Counts the "Whole Number of Persons" in Each State and There Is No Count of "Citizens" by the Decennial Census.

A. Legal Framework and History of the Census.

The Constitution contains only one explicit requirement regarding the enumeration of population: to properly apportion the number of seats in the House of Representatives among the states, "the whole number of persons in each State," U.S. Const. amend XIV, § 2, must be enumerated "every . . . ten years, in such Manner as [Congress] shall by Law direct," *id.* art. I, § 2.[3]

Since the original decennial Census in 1790, Congress has passed a number of laws regarding the Census.[4] The discretion afforded the Census Bureau to determine the content and methodology of the Census has grown over time. Originally, U.S. Marshals conducting the Census took an oath to obtain "a just

---

[3] As historical documents show, this was from the start understood to be a "Census of Inhabitants," without regard to citizenship. *See, e.g.*, Letter from Postmaster General Timothy Pickering to Secretary of State Thomas Jefferson, Dec. 26, 1793, http://founders.archives.gov/documents/Jefferson/01-27-02-0557 (last visited Sept. 23, 2015) (referring to the "Census of Inhabitants").

[4] *See generally* U.S. Census Bureau, Census Instructions, https://www.census.gov/history/www/through_the_decades/census_instructions/ (last visited Sept. 23, 2015) (providing description of congressional authorizations and instructions provided to U.S. Marshals, enumerators, and inhabitants from 1790 to 2010).

and perfect enumeration," *see* Act of Mar. 1, 1790, § 1, 1 Stat. 101. Congress amended this provision in 1810 to require "an actual inquiry at every dwelling-house." Act of Mar. 26, 1810, § 1, 2 Stat. 565-66. The current Census Act, enacted in 1954, also required data be collected by personal visit until it was modified first to permit some non-apportionment data to be obtained through statistical sampling, *see* 13 U.S.C. § 195, and then to repeal the requirement that Census data be obtained through personal visits, and thus permit the Census Bureau to obtain responses through the mail, *see* Act of Aug. 31, 1964, Pub. L. No. 88-530, 78 Stat. 737.

Currently, the only statutorily required data point the Census Bureau must obtain is a "tabulation of total population by States," 13 U.S.C. § 141(b), which is necessary to fulfill the constitutional mandate to apportion based on the "whole numbers of persons," U.S. Const. amend. XIV, § 2; *see Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999) (holding that Census Act requires actual enumeration data, not sample-based counts, to be used for apportionment purposes). Beyond that, the Secretary of Commerce, acting through the Census Bureau and its directors, is granted wide latitude to conduct the Census "in such form and content as he [or she] may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary." 13 U.S.C. § 141(a).

Exercising the discretion afforded by Congress (and, in turn, conferred upon Congress by the

Constitution), the Census Bureau has, in every Census since 1970, asked only a limited number of questions (known as the "short form") as part of the actual enumeration of every person. These "short form" questions are generally limited to information such as name, age, sex, and race.[5] From 1970 to 2000, the Census Bureau also sent a "long form" to approximately one in every six households.[6] This "long form" was used to collect answers to a wider array of questions, including demographic, economic, social, and housing questions, as well as inquiring about citizenship status.[7] The data gathered through the "long form" sampling was used by local, state, and federal agencies to administer a wide range of government programs. *See Dep't of Commerce*, 525 U.S. at 341 (characterizing the Census as the "linchpin of the federal statistical system" (quotation marks omitted)).

---

[5] *See* U.S. Census Bureau, Index of Questions, https://www.census.gov/history/www/through_the_decades/index_of_questions/ (last visited Sept. 23, 2015).

[6] *See, e.g.*, U.S. Census Bureau, *Summary File 3: 2000 Census of Population & Housing*—Chapter 8: Accuracy of the Data 8-3 (July 2007), https://www.census.gov/prod/cen2000/doc/sf3.pdf. Although the total sample size was one in six households, it was not evenly distributed: a greater percentage of households in rural areas were sampled to increase the reliability of the data estimates in such areas. *Id.*

[7] *See* U.S. Census Bureau, Index of Questions, https://www.census.gov/history/www/through_the_decades/index_of_questions/ (listing long form questions for 1970 to 2000) (last visited Sept. 23, 2015).

Following the 2000 Census, the decennial "long form" was discontinued and was replaced by a continual sampling program called the American Community Survey ("ACS"). ACS collects the same type of information that was included on the long form, but does so on a continuous basis throughout the decade.[8] Each month, about 295,000 addresses are mailed the ACS questionnaire, for a total of 3.5 million households a year, or roughly one in thirty-eight households.[9] The ACS data is then used to generate three sets of estimates, according to the size of the jurisdictions covered: a yearly report for cities and states with over 65,000 people, a three-year report for jurisdictions with over 20,000 people, and a five-year report for all jurisdictions.[10] This practice reflects the small size of the ACS sample compared to the prior decennial long form, and the resultant larger sampling errors. A new version of each report is published every year, with the most recent year's data replacing the oldest year's data in the three- and five-year versions.[11] The smallest geographic unit for which ACS estimates are available

---

[8] *See* U.S. Census Bureau, *American Community Survey Information Guide*, http://www.census.gov/acs/www/about_the_survey/acs_information_guide/flipbook/.

[9] *Id.* at 6, 8.

[10] *See* U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data* at 9 (Oct. 2008), https://www.census.gov/content/dam/Census/library/publications/2008/acs/ACSGeneralHandbook.pdf; *see id.* Appendix 1 at A-1-A-2.

[11] *See id.* at 13. For example, if one five-year report aggregates information from 2008 to 2013; the next report will cover 2009 to 2014.

is the Census block group level in the five-year report. Unlike short form counts, ACS estimates are never available at the individual Census block level.[12]

B. States Rely on Census Data to Redistrict.

Understandably, states and municipalities do not generally fulfill their requirement to redistrict congressional, state legislative, and other local districts by conducting their own, separate population counts. Rather, they largely rely on Census data to perform their redistricting obligations. *See Bd. of Estimate of City of New York v. Morris*, 489 U.S. 688 (1989); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964). Indeed, the constitutions and laws of a number of states expressly require that decennial Census data be used to redistrict. *See, e.g.*, N.J. Const. art. IV, § 2, ¶ 1 (requiring state senate seats to be apportioned "as nearly as may be according to the *number of their inhabitants* as reported in the last preceding decennial census of the United States" (emphasis added)); Pa. Const. art. 2, § 17(a) (requiring redistricting to occur "each year following the Federal

---

[12] *Id.*, Appendix 1 at A-2. The Census Bureau has developed different levels of "statistical geography" to report information. The largest is the Census tract; typically each county will contain several tracts, with each tract having an ideal population of 4,000 (ranging from 1,200 to 8,000). *See* U.S. Census Bureau, *2010 Geographic Terms and Concepts*, https://www.census.gov/geo/reference/terms.html (last visited Sept. 23, 2015). Block groups are clusters of blocks within a tract, and contain between 600 and 3,000 people. *Id.* The lowest level of geography is the individual Census block, which follows physical features (such as the streets bounding a city block) or non-physical features (such as property lines). *Id.*

decennial census"); Ga. Const. art. 3, § 2 (same); Ill. Const. art. 4, § 3(b) (same); Fla. Stat. § 11.031(1) ("All acts of the Florida Legislature based upon population and all constitutional apportionments shall be based upon the last federal decennial statewide census"); Ill. Comp. Stat., ch. 55, § 2-3001c (defining "[p]opulation" for county board redistricting as "the number of inhabitants as determined by the last preceding federal decennial census"); *see also Karcher v. Daggett*, 462 U.S. 725, 738 (1983) (approving the use of decennial Census counts for congressional redistricting, noting that because "the census count represents the best population data available, it is the only basis for good-faith attempts to achieve population equality" (internal quotation marks and citation omitted)).

States and municipalities do, however, generally use their own geographic units—called voter precincts—for purposes of conducting elections in their respective jurisdictions. Each voter precinct is comprised of a number of Census blocks. Congress has facilitated states' reliance on Census data for redistricting by providing that states may submit to the Census Bureau, three years prior to the decennial Census, the geographic boundaries for which they would like Census data to aid them in making redistricting decisions. *See* 13 U.S.C. § 141(c). Thus, states generally provide the Census with voter precinct information, and the Census in turn provides the states with data files that are organized by voter precincts.[13]

---

[13] If the Court holds that the Constitution requires states and local governments to use voting age citizens as the measure for the one-person, one-vote principle, nothing in the Constitution or in the

II. Serious Practical Concerns Counsel Against Constitutionally Requiring States to Draw Districts with Equal Numbers of Voting Age Citizens.

A constitutional requirement mandating that states draw legislative districts with equal numbers of voting age citizens would be impossible to accurately implement with currently available data. Moreover, for several reasons, it would be difficult to obtain an accurate actual count, even were one attempted.

A. ACS Citizenship Estimates Cannot Provide the Basis For a Constitutional Equal Protection Rule.

The actual number of voting age citizens in each state is unknown. The only information in existence is ACS's statistical sample-based estimates. In some circumstances, statistical sampling can be preferable to an actual count. *See Dep't of Commerce*, 525 U.S. at 322-23 ("Some identifiable groups—including certain minorities, children, and renters—have historically had substantially higher undercount rates than the population as a whole."); *id.* at 354 ("[U]nadjusted headcounts are also subject to error or bias—the very fact that creates the need for a statistical supplement") (Breyer, J., concurring in part, dissenting in part). But

---

current Census Act would require the Census Bureau to provide this information to states and local governments. Rather, the Court would be requiring states and local governments to obtain this information on their own, in the process abrogating the many state constitutional and statutory provisions linking the state process to the federal Census data.

the ACS was not designed to provide data to support a constitutional right to districts with equal numbers of voting age citizens.

1. The ACS Estimates Do Not Align with the Timing of Redistricting.

As an initial matter, the ACS estimates do not align with the timing of congressional apportionment or traditional legislative apportionment. States traditionally redistrict their state legislative districts at the same time as their congressional districts, using the same decennial Census count that triggered the congressional reapportionment. States thus use the Census count to create population equality among and within the states measured by a single, consistent snapshot in time that persists for the decade. As this Court explained in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), *superseded by statute on other grounds as stated in Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015):

> When the decennial census numbers are released, States must account for any changes or shifts in population. But before the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned. After the new enumeration, no districting plan is likely to be legally enforceable if challenged, given the shifts and changes in a population over 10 years. And if the State has not redistricted in response to the new census figures, a federal court will ensure that the districts comply with the one-person, one-vote mandate before the next election.

Id. at 488 n.2. This "legal fiction" is "necessary to avoid constant redistricting, with accompanying costs and instability." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 421 (2006) (opinion of Kennedy, J., joined by Souter, J., and Ginsburg, J.).

Using the ACS voting age citizen estimates would unsettle this system. To begin, only the five-year information could be used because the one- and three-year reports are not statistically reliable at the small geographic units used to draw district boundaries. *See supra* Part I. This poses several problems that seriously undermine the ACS's utility for redistricting.

First, with respect to the ACS five-year survey, eighty percent of the data is already between two and five years old at the time of redistricting. In contrast, redistricting occurs as soon as the population counts currently used by states is released by the Census Bureau. To illustrate, if ACS estimates were used instead of the total population count, a state redistricting in 2021 would be using aggregated estimates spanning from 2015 to 2020. Because the map drawn in 2021 would govern elections through the decade, by 2030, forty percent of the underlying aggregated estimates will be from questionnaires answered fourteen or fifteen years prior. The ACS estimates are therefore a more stale source of information than the total population count currently relied upon by the states.

Second, because the ACS estimates contain five years of sampling, and the age information is not adjusted each year to reflect the passage of a year, many respondents who were between the ages of

thirteen and seventeen when their responses were recorded will continue to be excluded from the *voting age* citizen count at the time the estimates are used to draw district lines, despite the fact that they are in fact eighteen or older at that time. *See* Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755, 777 (2011). This problem is exacerbated, as discussed above, by the fact that district lines remain in place for a decade, meaning that at the end of the redistricting cycle, a thirty-two-year-old person is not "counted" as a voting age person in their district if she was seventeen when first surveyed.

Third, the share of minorities among people under the age of eighteen greatly exceeds their share of the total population.[14] As a result, areas with larger minority populations will be disproportionately affected by the use of ACS estimates that are not annually updated to reflect the actual age of respondents at the time the report is released, thus undercounting "eligible voters" among minority communities and therefore overpopulating minority legislative districts.

Together, these issues would result in outdated information governing district lines and entrenched undercounting of young voters, disproportionately affecting minority populations. For these reasons, the

---

[14] *See* Sandra L. Colby & Jennifer M. Ortman, U.S. Census Bureau, *Projections of the Size and Composition of the U.S. Population: 2014 to 2016* 10-11 (Mar. 2015), https://www.census.gov/content/dam/Census/library/publications/2015/demo/p25-1143.pdf.

use of five-year-old ACS estimates cannot support the constitutional one-person, one-vote requirement.

2. ACS Estimates Are Not Available at the Smallest Geographic Levels, and Some Data is Suppressed to Protect Privacy.

An additional problem is that ACS estimates are not available at the smallest geographical level that is actually used for purposes of redistricting—the Census block. The smallest geographic level at which ACS estimates can accurately be utilized is the block group level. *See Persily*, 32 Cardozo L. Rev. at 777. This would pose significant problem for states seeking to evenly populate districts. "In order to achieve the lowest possible levels of deviation within state legislative and congressional plans, state technicians have repeatedly advised the Census Bureau that they need decennial counts by small-area geography such as voting districts and census blocks."[15] States need data at granular levels in order to make a good-faith effort to equalize population to the extent possible among districts. *See Karcher*, 462 U.S. at 730 (requiring that, for congressional redistricting, states "make a good-faith effort to achieve precise mathematical equality" (quotation marks omitted)); *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (noting that the Court has permitted "minor deviations from mathematical equality among state legislative districts" (quotation marks omitted)). Without the granular Census block

---

[15] Catherine McCully, U.S. Census Bureau, *Designing P.L. 94-171 Redistricting Data for the Year 2020 Census* 7-8 (Dec. 2014), http://www.census.gov/content/dam/Census/library/publications/2014/rdo/pl94-171.pdf.

data typically used to balance population between and among districts, states relying upon ACS voting age citizen estimates likely will be unable to satisfy the standard this Court requires for legislative redistricting.

Moreover, even at the block group level, there are a number of geographical areas where there are too few people to permit the Census Bureau to even release estimates without jeopardizing privacy. Congress has mandated that Census data may only be used for "the statistical purpose for which it is supplied," 13 U.S.C. § 9(a)(1), and that the Census Bureau may not "make any publication whereby the data furnished by any particular . . . individual . . . can be identified," *id.* § 9(a)(2). As a result, the Census Bureau suppresses certain estimates that could be linked to identifiable persons in light of the small geographic size of the reporting area.[16]

States depend upon population counts being reported at small geographic units to permit districts to be built that meet the constitutional requirement for equal distribution of population. In addition, having decennial Census counts available at small geographic units makes it easier to follow voter precinct lines or other political subdivision lines, such as city boundaries, particularly where those lines have recently changed by annexations or precinct splits. The ACS voting age citizen estimates are not reported—and in some cases

---

[16] *See* U.S. Census Bureau, *American Community Survey: Data Suppression* 2, 7 (Nov. 15, 2013), http://www2.census.gov/programs-surveys/acs/tech_docs/data_suppression/ACSO_Data_Suppression.pdf.

are statutorily prohibited from being reported—at the Census block level. The ACS estimates thus cannot meet the needs of states for redistricting purposes.

3. As a Statistical Sample, ACS Estimates Are Subject to Error That Makes their Use for Line-Drawing Difficult.

As with any survey, the ACS estimates are subject to non-sampling errors (*e.g.*, errors in data coding) and sampling errors (*e.g.*, the chosen sample is non-representative of the actual community).[17] The ACS reports margins of error at the ninety percent confidence level.[18] For example, if the ACS estimates reported that a county had 10,000 citizens over the age of eighteen, with a five percent relative error, nine times out of ten (ninety percent of the time) one could be confident that the actual citizen voting age population of the county was between 9,500 and 10,500.

The margin of error grows as the sample size decreases, so the smaller the area, the higher the possibility of error. This could become a significant issue because redistricting decisions are often made on the margins, using very small geographic units to

---

[17] *See* U.S. Census Bureau, *American Community Survey Design and Methodology (January 2014)*—Chapter 15: Improving Data Quality by Reducing Non-Sampling Error, at 1 (Jan. 30, 2014), http://www2.census.gov/programs-surveys/acs/methodology/design_and_methodology/acs_design_methodology_ch15_2014.pdf.

[18] U.S. Census Bureau, *Glossary: Confidence interval (American Community Survey*, https://www.census.gov/glossary/#term_ConfidenceintervalAmericanCommunitySurvey (last visited Sept. 23, 2015).

surgically move populations in and out of districts to satisfy the one-person, one-vote requirement. And, as discussed above, the smallest unit—the Census block—is not available with ACS estimates because of sample size limitations.

Take for example Titus County, Texas, where Appellant Sue Evenwel resides. *See* Br. of Appellants at 10. Titus County has eight Census tracts, each with between two and four Census block groups, for a total of twenty-two block groups—the smallest level of geography reported by the ACS. The relative error for the ACS's estimates of voting age citizens for the Titus County block groups range from a low of 14.1 percent to a high of 36.6 percent. Figure 1 below shows the estimates by block group for Titus County.

Figure 1: Titus County, Texas CVAP Estimates with Absolute and Relative Error by Block Group (2009-2013)

Block Group	Est. CVAP with Absolute and Relative Error	Block Group	Est. CVAP with Absolute and Relative Error
9501: #1	1,045 ±213 (20.4%)	9505: #1	640 ±153 (23.9%)
9501: #2	485 ±148 (30.5%)	9505: #2	560 ±149 (26.6%)
9502: #1	895 ±162 (18.1%)	9506: #1	750 ±197 (26.3%)
9502: #2	680 ±116 (17.1%)	9506: #2	825 ±192 (23.3%)
9503: #1	1,445 ±236 (16.3%)	9506: #3	615 ±154 (25.0%)
9503: #2	905 ±204 (22.5%)	9507: #1	325 ±90 (27.7%)
9503: #3	1,870 ±263 (14.1%)	9507: #2	315 ±114 (36.2%)
9503: #4	540 ±177 (32.8%)	9508: #1	655 ±240 (36.6%)
9504: #1	1,360 ±264 (19.4%)	9508: #2	575 ±178 (31.0%)
9504: #2	2,020 ±301 (14.9%)	9508: #3	815 ±193 (23.7%)
9504: #3	850 ±210 (24.7%)	9508: #4	330 ±111 (33.6%)

As Figure 1 shows, even if redistricters could conceivably rely upon block groups to move areas

among districts to properly draw boundaries, they would contend with relatively large error margins. For example, if an adjoining district needed to be increased by 330 voting age citizens, Block Group 4 of Census Tract 9508 would be considered. But the most that can be said is that nine times out of ten, one could be confident that there were between 219 and 441 voting age citizens in that area—a 33.6 percent relative error.

The error margins are still relatively high at the next largest geographic unit, the Census tract, as illustrated by Figure 2 below.

Figure 2: Titus County, Texas CVAP Estimates and Error Margins by Census Tract

Census Tract	Est. CVAP	Absolute Error	90% Confidence Range	Relative Error
9501	1,530	± 210	1,320 – 1,740	13.7%
9502	1,570	± 180	1,390 – 1,750	11.5%
9503	4,755	± 297	4,458 – 5,052	6.2%
9504	4,230	± 297	3,933 – 4,527	7.0%
9505	1,200	± 182	1,018 – 1,382	15.2%
9506	2,190	± 217	1,973 – 2,407	9.9%
9507	635	± 123	512 – 758	19.4%
9508	2,375	± 237	2,138 – 2,612	10.0%

The relative error ranges from 6.2 to 19.4 percent for the Titus County Census tracts. So, if redistricters needed to move 635 people to a neighboring district, tract 9507 would be an obvious candidate, but using ACS estimates, the most they could know is that nine

times out of ten, it would contain between 512 and 758 citizens of voting age.[19]

All of these issues together—the timing issues, the unavailability of estimates at the block level typically used by redistricters, the unavailability of certain estimates because of privacy concerns, and the error margins combine to make the ACS voting age citizen estimates an inappropriate source to support the constitutional one-person, one-vote right.

This is not to say the ACS estimates are inappropriate for other uses. Because it is the only citizenship information that exists, where courts require citizenship information to support legal claims, as some have for cases under Section 2 of the Voting Rights Act, *see, e.g., Valdespino v. Alamo Heights Independent School District*, 168 F.3d 848, 853 (5th Cir. 1999), it is the "best population data available," *Karcher*, 462 U.S. at 738 (quotation marks omitted). It is one thing to use less than perfect data when it is the only data available to meet a statutory evidentiary burden; it is quite another to create and impose a new constitutional rule that must necessarily be built upon that data.

---

[19] Data for both Figures 1 and 2 is taken from U.S. Census Bureau, Redistricting Data, *Voting Age Population by Citizen and Race (CVAP), 2009-2013 American Community Survey 5 Year Estimates*, https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html (last visited Sept. 23, 2015).

B. Asking Citizenship Status of Every Household Would Lead to Reduced Response Rates and Inaccurate Responses, While Multiplying Privacy and Government Intrusion Fears.

Directly inquiring about citizenship status as part of the short form Census is not a solution to the data problem posed by Appellants' legal theory. Doing so would likely exacerbate privacy concerns and lead to inaccurate responses from non-citizens worried about a government record of their immigration status.

During the past two decades, the Census Bureau has had to contend with significantly increased distrust, based on concerns about government intrusion and privacy. When the 2000 Census was taken, controversy erupted over the Census questions, with congressional leaders and others calling on people to disregard questions they found intrusive.[20] In one survey, 71 percent of respondents said that intrusive questions should go unanswered.[21] This problem continued with the 2010 Census—between 2009 and 2010, one survey showed the Census Bureau dropped in its "trust" rating from 75 percent to 39 percent.[22] One

---

[20] Kenneth Prewitt, *What if We Give a Census and No One Comes?*, 304 Sci. Mag. 1452 (June 4, 2004).

[21] *Id.*

[22] Andy Greenberg, *Census Paranoia Fueled Distrust in Government Privacy More than NSA Wiretapping*, Forbes, June 30, 2010, http://www.forbes.com/sites/firewall/2010/06/30/census-paranoia-fueled-distrust-in-government-privacy-more-than-nsa-wiretapping/.

Congresswoman publicly proclaimed that her family "will only be indicating the number of people in the household, because 'the Constitution doesn't require any information beyond that.'"[23]

A mandatory inquiry into citizenship status is all the more likely to engender privacy concerns, particularly among non-citizens. "The nuanced reasons for the question . . . will of course be lost to millions upon millions of Americans. The question will be viewed with suspicion."[24] "[I]t is foolish to expect that census-taking is immune from anxieties that surround such issues as undocumented aliens, immigration enforcement, terrorism prevention, national identity cards, total information awareness, and sharp increases in surveillance generally."[25]

In addition to both citizens and non-citizens simply not responding, "[n]on-citizens, mistrustful of the government's promise that their answers to a census question can never be used against them, will misrepresent themselves on the census form."[26]

---

[23] Prerana Swami, *Rep. Bachmann Refuses to Fill out 2010 Census*, CBS News (June 18, 2009), http://www.cbsnews.com/news/rep-bachmann-refuses-to-fill-out-2010-census/.

[24] *Counting the Vote: Should Only U.S. Citizens be Included in Apportioning Our Elected Representatives?: Hearing Before Subcomm. on Federalism and the Census of the H. Comm. on Gov't Reform*, 109th Cong. 77 (2005) (Statement of Kenneth Prewitt).

[25] *Id.* at 78.

[26] *Id.*

The sum effect would be bad Census data. And any effort to correct for the data would be futile.

> The Census Bureau cannot become a quasi-investigatory agency and still perform its basic responsibilities as a statistical agency. Responses to a citizenship question cannot be validated on a case-by-case basis. Although the bureau may devise ways to estimate the magnitude of misrepresentation in responses to a citizenship question at the national level, such an estimate would not likely be robust enough to be used in state-level counts—let alone at the smaller levels of geography relevant to congressional districting, state legislatures, and local government.[27]

Finally, because a one-by-one citizenship inquiry would invariably lead to a lower response rate to the Census in general, such an inquiry would seriously frustrate the the Census Bureau's ability to conduct the only count the Constitution expressly requires: determining the whole number of persons in each state in order to apportion House seats among the states. *See* U.S. Const. art. II, § 1; *id.* amend XIV, § 2.[28]

Neither existing data estimates nor a potential actual count can reliably permit states to draw districts

---

[27] *Id.*

[28] Appellants offer no explanation for how it could be that the Fourteenth Amendment *forbids* Texas from apportioning seats within the state in the same manner the Fourteenth Amendment *requires* seats to be apportioned among the states.

with equal numbers of voting age citizens. As a result, voting age citizen data cannot plausibly serve as a constitutionally-mandated metric for defining the one-person, one-vote principle.

III. Voter Registration Data Would Be an Inappropriate Measure Upon Which to Require Districts To Be Drawn.

Appellants' alternative measure—voter registration data—is also an inappropriate measure by which to require states to draw districts. The data is often inaccurate and unreliable, it is prone to dramatic changes, and it is generally available only at the voting precinct level, not at the smaller Census block level at which states generally draw districts.

Although this Court has before *permitted* a state to draw districts based on voter registration data, it did so only for an interim districting plan with assurances that the data in the particular case did not vary from other population measures. In so doing, the Court expressed considerable doubts about the use of this data, stating:

> Use of a registered voter or actual voter basis . . . depends . . . upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a ghost of prior malapportionment. Moreover, fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly

> controversial election issue, a particularly popular candidate, or even weather conditions.

Burns v. Richardson, 384 U.S. 73, 92-93 (1966) (internal quotation marks omitted) (footnotes omitted). These problems have not changed since 1966 when *Burns* was decided.

A 2012 study by the Pew Charitable Trust found that approximately 24 million voter registration records in the United States—1 in 8—are invalid or inaccurate, including 12 million with incorrect addresses, suggesting voters had moved or the addresses were otherwise incorrect.[29] The study also found 1.8 million deceased still registered, and 2.75 million voters registered in more than one state.[30]

Beyond the inaccuracy of voter registration data, state registration data simply is not available at the Census block level. Rather, the smallest geographic unit at which voter registration data is available is the voter precinct level. Thus, redistricters would not be able to move particular Census blocks from district to district and would instead be limited to moving precincts. These geographic areas are generally too large to accurately draw districts with substantially equal populations.

---

[29] Pew Charitable Trust, *Inaccurate, Costly, and Inefficient: Evidence that America's Voter Registration System Needs an Upgrade* 3-4 (Feb. 2012), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2012/PewUpgradingVoterRegistrationpdf.pdf.

[30] *Id.* at 4.

In light of the serious flaws in voter registration data, it would in most instances be a violation of equal protection for this metric to be used, contrary to Appellants' argument that the Constitution actually should require it.[31]

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the district court.

Respectfully submitted,

J. Gerald Hebert
Trevor Potter
CAMPAIGN LEGAL CENTER
1411 K St. NW, Suite 1400
Washington, DC 20005
(202) 736-2200

Anita S. Earls
SOUTHERN COALITION FOR SOCIAL JUSTICE
1415 West Highway 54
Suite 101
Durham, NC 27707
(919) 794-4198

Paul M. Smith
Jessica Ring Amunson
Counsel of Record
Mark P. Gaber
JENNER & BLOCK LLP
1099 New York Ave. NW
Suite 900
Washington, DC 20001
(202) 639-6000
jamunson@jenner.com

September 25, 2015

---

[31] The "Non-Suspense Voter Registration" metric offered by Appellants is equally flawed—it adds additional potential error related to mailing of notices. *See* Br. of Appellants at 9.

No. 14-940

Supreme Court, U.S.
FILED
SEP 25 2015
OFFICE OF THE CLERK

In The

Supreme Court of the United States

SUE EVENWEL, et al.,

Appellants,

v.

GREG ABBOTT, In His Official Capacity as Governor of Texas, et al.,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

BRIEF OF HARRIS COUNTY, TEXAS, AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

VINCE RYAN
Harris County Attorney
HARRIS COUNTY, TEXAS
1019 Congress, 15th Floor
Houston, Texas 77002
(713) 755-5101
vince.ryan@cao.hctx.net

C. ROBERT HEATH
Counsel of Record
GUNNAR P. SEAQUIST
BICKERSTAFF HEATH
DELGADO ACOSTA LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746
(512) 472-8021
bheath@bickerstaff.com
gseaquist@bickerstaff.com

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Does the Fourteenth Amendment's command that no state shall "deny to any person within its jurisdiction the equal protection of the laws" require that states and local jurisdictions exclude children and resident immigrants from the apportionment base?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Authorities v

Interest of *Amicus Curiae* 1

Summary of Argument 2

Argument 7

I. The claim that legislative seats must be apportioned on the basis of equal numbers of voters or potentially-eligible voters is not based on the text of the Constitution and finds no support in its language 7

II. Ms. Evenwel's argument is logically flawed and is not supported by this Court's one-person, one-vote cases 9

A. The three points Ms. Evenwel claims compel the conclusion that districts must have equal numbers of voters rather than population are not supported by the cases and do not lead to that conclusion 11

B. The 1964 *Reynolds* Court could not have intended to mandate voter-based apportionment, since doing so would have had the effect of virtually eliminating African-Americans from the representation formula 15

TABLE OF CONTENTS – Continued

Page

C. This Court's post-*Reynolds* apportionment decisions do not compel or even suggest that voter-based, rather than population-based, districting is required 19

III. The original understanding of the Equal Protection Clause did not extend to voter-based apportionment 22

A. The framers of the Fourteenth Amendment did not understand voter-based apportionment either to be a constitutional principle or to be the established standard for determining representation 22

1. Section 2 of the Fourteenth Amendment was drafted in the context of shifting political power resulting from the end of the Civil War and the emancipation of the slaves as well as the differing ratio of voters to population among the loyal states 24

2. The House was presented with both voter-based and population-based apportionment options 26

(a) The Joint Committee rejected the voter-based option and recommended passage of a population-based model 29

TABLE OF CONTENTS – Continued

Page

(b) The House debated the merits of both apportionment models and rejected the voter-based model while approving the population-based model 31

3. The Senate failed to achieve a two-thirds majority 33

4. A more comprehensive constitutional amendment emerged from the Joint Committee, but the requirement of population-based apportionment remained intact 35

5. The Senate, as the House had done earlier, overwhelmingly rejected voter-based apportionment and adopted a population-based system 36

B. The history of the consideration of the Fourteenth Amendment reveals that the drafters were well aware of the effects of both voter-based and population-based systems of apportionment and that they expressly and overwhelmingly rejected the voter-based metric in favor of apportionment on the basis of population 38

Conclusion 41

TABLE OF AUTHORITIES

Page

CASES

Abate v. Mundt, 403 U.S. 182 (1971) 19

Application of Gault, 387 U.S. 1 (1967) 3, 9

Avery v. Midland County, Tex., 390 U.S. 474 (1968) 19, 20, 21

Baker v. Carr, 369 U.S. 186 (1962) 9, 10, 11, 13

Board of Estimate of City of New York v. Morris, 489 U.S. 688 (1989) 19, 20

Brown v. Thomson, 462 U.S. 835 (1983) 19

Burns v. Richardson, 384 U.S. 73 (1966) 5, 22

Connor v. Finch, 431 U.S. 407 (1977) 19

Gaffney v. Cummings, 412 U.S. 735 (1973) 19

Gray v. Sanders, 372 U.S. 386 (1963) 10, 11, 13

Hadley v. Junior College Dist. of Metropolitan Kansas City, Mo., 397 U.S. 50 (1970) 21

Mahan v. Howell, 410 U.S. 315 (1973) 19

Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964) 19

Michael H. v. Gerald D., 491 U.S. 110 (1989) 8

Plyler v. Doe, 457 U.S. 202 (1982) 3, 9

Reynolds v. Sims, 377 U.S. 533 (1964) ..... *passim*

Richardson v. Ramirez, 418 U.S. 24 (1974) 40

State of Alabama v. United States, 304 F.2d 583 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962) 16, 17, 18

TABLE OF AUTHORITIES – Continued

Page

State of Alabama v. United States, 371 U.S. 37 (1962) (*per curiam*).....16, 17

Swann v. Adams, 385 U.S. 440 (1967).....19, 20

United States v. State of Alabama, 192 F. Supp. 677 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962).....18

Westberry v. Sanders, 376 U.S. 1 (1964).....10, 11, 13

Yick Wo v. Hopkins, 118 U.S. 356 (1886).....3, 9

STATUTES AND CONSTITUTIONAL PROVISIONS

U.S. CONST., FOURTEENTH AMENDMENT .....*passim*

OTHER AUTHORITIES

Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 CHI. L. REV. 1175, 1183 (1989).....8

BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1866-1867, New York (1914), at 41 .....29, 30, 32

Claude Sitton, *Negro Queue in Mississippi is Symbol of Frustration in Voter Registration Drive*, NEW YORK TIMES, March 2, 1964 16

Congressional Globe, 39th Cong. .....*passim*

E.W. Kenworthy, *Civil Rights Forces Assail Denial of Vote to Negro*, NEW YORK TIMES, Apr. 2, 1964 16

TABLE OF AUTHORITIES – Continued

Page

George P. Smith, *Republican Reconstruction and Section Two of the Fourteenth Amendment*, 23 WESTERN POL. Q. 829, 841-42 (1970).....32

HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 99 (The Johns Hopkins Press, 1908).....26

JOSEPH T. SNEED III, FOOTPRINTS ON THE ROCKS OF THE MOUNTAIN: AN ACCOUNT OF THE ENACTMENT OF THE FOURTEENTH AMENDMENT (1997).....26, 34

Negro Gain Slow in Winning Vote, NEW YORK TIMES, Nov. 24, 1963.....16

Robert Dale Owen, *Political Results from the Varioloid*, 35 ATLANTIC MONTHLY 660, 665 (June 1875).....34

U.S. CENSUS BUREAU, AMERICAN FACT FINDER, 2014 Population Estimates.....1

U.S. CENSUS BUREAU, AMERICAN FACT FINDER, Table B05006 (2009-2013) (Harris County, Texas).....1

U.S. COMM'N ON CIVIL RIGHTS, *The Voting Rights Act: The First Months*, 1965, at 37 18

U.S. DEPT. OF THE INTERIOR, 1860 CENSUS OF POPULATION, at *vii* (1864).....25

INTEREST OF *AMICUS CURIAE*[1]

Harris County, Texas, is the largest county in Texas with a population of approximately 4.44 million persons or about one in every six residents of the State of Texas.[2] The county's population exceeds that of 25 states and is roughly equivalent to the combined population of the six smallest states.[3] Harris County is an international community, welcoming its residents from more than 110 different countries.[4] It has proportionately a larger percentage of children and non-citizens than the state as a whole. As a result, a change in the model of representation from a population-based metric to one based on eligible voters – *i.e.*, one that excludes children and resident non-citizens – will result in a decrease of the county's representation in the state legislature along with an accompanying increase of representation for areas with lower populations.

Harris County, much like the framers of the United States Constitution in 1787 and the drafters

---

[1] Rule 37 Statement: All parties filed with the Clerk blanket consents to the filing of *amicus* briefs. Additionally, this brief is authorized to be filed under Rule 37.4. No part of this brief was authored by any party's counsel, and no person or entity other than the *amicus* funded its preparation or submission.

[2] U.S. CENSUS BUREAU, AMERICAN FACT FINDER, 2014 Population Estimates.

[3] *Id.*

[4] U.S. CENSUS BUREAU, AMERICAN FACT FINDER, Table B05006 (2009-2013) (Harris County, Texas).

of the Fourteenth Amendment in 1866, believes that children and resident non-citizens should not be ignored when crafting a model of representation. While those under the age of eighteen are not yet permitted to vote, the resources we allocate to their education, healthcare, and safety will determine the community's future stability and prosperity. To the extent the county loses representation, which would be the effect of the appellants' legal theory, it is more likely that resources will be re-directed to less populous areas. Similarly, resident non-citizens, including both documented and undocumented immigrants, pay taxes and contribute to the economy. They are part of the population that uses roads, schools, infrastructure, and other services and facilities provided by the state and county. The rules and laws adopted by the state or the county apply to them just as they do to citizens. The county believes that the most effective model of representation is one that includes all the affected population and further believes that such a model conforms to the long-standing understanding of the scope of the Equal Protection Clause.

SUMMARY OF ARGUMENT

Although the appellant,[5] Ms. Evenwel, asserts that the Equal Protection Clause mandates that

[5] There are two appellants. In this brief, we refer to them collectively by the name of the lead plaintiff, Ms. Evenwel.

children and resident non-citizens be excluded from the representation model and apportionment base for legislative districts, her claim derives no support from the text of the Constitution. Under her preferred representation model, state-senate districts, and presumably state-house and local-government districts, would be drawn without considering children, resident non-citizens, and others who are not eligible to vote, so that districts would be based solely on the number of eligible voters rather than population. The Equal Protection Clause, however, applies to "any person," a category that this Court has long held to encompass children and non-citizens.[6] Further, the Fourteenth Amendment requires that *citizens* not be denied the privileges and immunities of citizenship, while later in the same sentence it extends the guarantees of equal protection and due process to the broader category of *any person*. The drafters knew that words had different meanings and were precise in how they used them.

Unable to find a textual basis for her claim in the Constitution, Ms. Evenwel relies on language from this Court's one-person, one-vote cases, especially *Reynolds v. Sims*,[7] the first legislative-districting case decided under the Equal Protection Clause. In *Reynolds*, though, the Court required that districts

---

[6] *E.g.*, *Plyler v. Doe*, 457 U.S. 202, 210-15 (1982); *Application of Gault*, 387 U.S. 1, 13 (1967); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

[7] 377 U.S. 533 (1964).

have equal population, not equal numbers of voters. The language in *Reynolds* does suggest that there may be circumstances where an apportionment on the basis of equal numbers of voters or a similar measure might be permissible, but it does not support a conclusion that an equal-voters metric is required.[8] Indeed, the Court in *Reynolds* could not have intended to require that voters, rather than population, be used as the apportionment standard. In mid-1964, when *Reynolds* was decided, it was well known to the Court and to the world that Alabama routinely, systematically, and effectively prevented African-Americans from registering to vote, especially in the majority-black rural counties. Had the *Reynolds* Court required voter-based apportionment, as Ms. Evenwel suggests, the effect would have been largely to remove African-Americans from the representation model. It is inconceivable this Court would have taken such a step.

Not only does *Reynolds* fail to support Ms. Evenwel's thesis, this Court's post-*Reynolds* cases also neither suggest nor compel the conclusion that voter-based apportionment is constitutionally required. In those cases, the Court typically determined whether a district was malapportioned under the one-person, one-vote standard by comparing the number of persons, not voters, in each district with the number of persons, not voters, in an ideally sized

---

[8] *Reynolds*, 377 U.S. at 577.

district. While this Court has accepted a registered-voter metric in at least one case, it was also careful to make clear that the decision to include or exclude aliens and other groups involved choices about the nature of representation with which it had been shown no constitutionally founded reason to interfere.[9] Further, in that case the Court noted that it accepted a voter-based apportionment "only because . . . it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis."[10]

Finally, it is inconceivable that the drafters of the Fourteenth Amendment could have thought or understood that they were requiring a model of representation based on voters rather than population. When the drafters of the Fourteenth Amendment were considering the Amendment's section 1, which contains the Equal Protection Clause, they also were approving section 2's apportionment model for the House of Representatives. The basic issue in the section 2 debate was whether the apportionment and representation model should be voter-based or population-based. The contemporary record reflects that the members of the 39th Congress were well aware that a population-based model would include women, children, and non-citizens as part of the

---

[9] *Burns v. Richardson*, 384 U.S. 73, 92 (1966).

[10] *Id.* at 93.

apportionment base. They knew, for example, how many non-citizens would go into the apportionment formula and which states would gain or lose representation because of their inclusion. The issue was squarely presented in the Joint Committee on Reconstruction,[11] the Senate, and the House of Representatives. The Joint Committee expressly chose a population-based model over a citizen-based metric by a vote of 11-3. In both the House and Senate, motions were made to substitute a voter-based model for the population-based one that had come from the Joint Committee. In each case, the voter-based model urged today by Ms. Evenwel was rejected by a margin of 4.5 to 1.

We know from this history that there is no theory of voter-based apportionment enshrined in the Constitution, and we also know that the framers of the Fourteenth Amendment, who used the term "persons" in section 2 to signify that apportionment would be on the basis of population and not on the number of voters, could not have imagined that when they used the term, "any person," in section 1's Equal Protection Clause, it might be interpreted as requiring voter-based apportionment. Words have meaning, and the framers of the Fourteenth Amendment used them carefully. The interpretation Ms. Evenwel urges ignores both the carefully chosen words of the text of

---

[11] The Joint Committee filled the role of the legislative committee for both the House and the Senate in reviewing the proposed Fourteenth Amendment.

the Fourteenth Amendment and the original understanding of what those words meant in terms of models of representation.

ARGUMENT

I. The claim that legislative seats must be apportioned on the basis of equal numbers of voters or potentially-eligible voters is not based on the text of the Constitution and finds no support in its language.

As Ms. Evenwel correctly notes, this case is governed by the Constitution, and more specifically the Equal Protection Clause, which provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[12] From that language, she concludes that the constitutional guarantee of equality in this context is limited not to "any person" but rather to eligible voters so that Texas state-senate districts – and by necessary implication, state-house districts and local-government single-member districts – must be drawn to contain equal numbers of eligible voters.[13] To be sure, she concedes that a jurisdiction may draw districts to be equal in total population, which would include, among others, children and resident non-citizens, but

[12] U.S. CONST., FOURTEENTH AMENDMENT, § 1; Brief for Appellants, at 1.

[13] *E.g.*, Brief for Appellants, at 19, 26, 28.

only if the equality of total population also produces equality of eligible voters.[14] Under the Evenwel theory, if districts are equal in total population that is a permissible serendipity, but equality in the number of eligible voters is the legal requirement. That supposed legal requirement, however, finds no support in the text of the Constitution but instead is fashioned from whole cloth.[15]

The Equal Protection Clause mandates equal treatment to any person, not to any eligible voter. Nor is it limited to citizens, who typically are the only persons who can qualify to vote. The drafters of the Fourteenth Amendment prohibited state laws that would deny privileges and immunities of citizenship to anyone who is a citizen of the United States, but later in that same sentence when they set out the guarantees of equal protection of the laws and of due process, the drafters expanded the covered class to include persons, whether citizens or not. Thus, when Ms. Evenwel argues that the Equal Protection Clause requires limiting the apportionment base and the theory of representation to eligible voters and denying children and resident non-citizens any consideration,

---

[14] Brief for Appellants, at 28-29.

[15] Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989) (judges cannot create rules out of whole cloth but must find some basis in the text of the Constitution); *see also*, *Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989) ("a rule of law that binds neither by text nor by any particular, identifiable tradition is no rule of law at all").

the argument does not derive from the text of the Constitution and, in fact, is inconsistent with it. Indeed, this Court has long recognized that the Equal Protection Clause's use of the term "person" causes its guarantee to reach children[16] and resident non-citizens[17] – two groups that Ms. Evenwel argues are constitutionally required by the Fourteenth Amendment to be omitted from the representation model. Her position cannot be squared with either the text of the Constitution or with this Court's interpretation of the scope of the Equal Protection Clause.

II. Ms. Evenwel's argument is logically flawed and is not supported by this Court's one-person, one-vote cases.

Lacking support in the text of the Equal Protection Clause or in this Court's cases construing that clause to encompass children and resident non-citizens, Ms. Evenwel bases her argument on this Court's one-person, one-vote cases, especially the early ones.[18] Specifically, she cites to *Baker v. Carr*,[19]

---

[16] *Application of Gault*, 387 U.S. 1, 13 (1967) ("neither the Fourteenth Amendment nor the Bill or Rights is for adults alone").

[17] *Plyler v. Doe*, 457 U.S. 202, 210-15 (1982) (undocumented immigrant children protected by the Equal Protection Clause); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) ("The fourteenth amendment to the constitution is not confined to the protection of citizens").

[18] *See, e.g.*, Brief of Appellants, at 19-29.

[19] 369 U.S. 186 (1962).

Gray v. Sanders,[20] and *Westberry v. Sanders*[21] as the cases that led to *Reynolds v. Sims*,[22] the seminal state-legislative, one-person, one-vote case and asserts that "[t]he Court need not look beyond these seminal decisions to resolve the question."[23] Of these, *Reynolds* is the most relevant, since it is the only one that addresses the issue of whether the Equal Protection Clause permits disparately sized legislative districts. *Baker* was limited to the question of justiciability and did not reach the substantive issue of the constitutionality of differently sized districts. *Gray* involved an electoral-college-type system where the ultimate votes for Governor of Georgia were cast by counties. *Westberry* was a legislative districts case, but, as a challenge to congressional districts, it was governed by article I, § 2, of the Constitution, as amended by section 2 of the Fourteenth Amendment, rather than by the Equal Protection Clause. *Reynolds* was the first case to consider whether differently sized legislative districts violated the Equal Protection Clause and is the one on which Ms. Evenwel and we rightly focus.

---

[20] 372 U.S. 386 (1963).

[21] 376 U.S. 1 (1964).

[22] 377 U.S. 533 (1964).

[23] Brief of Appellants, at 14.

A. The three points Ms. Evenwel claims compel the conclusion that districts must have equal numbers of voters rather than population are not supported by the cases and do not lead to that conclusion.

Relying on *Reynolds* and its predecessors, *Baker, Gray*, and *Westberry*, Ms. Evenwel, in the focal point of her brief pronounces that "[t]ogether, these cases compel the conclusion that the 'population' that must be equalized for purposes of the one-person, one-vote rule is the number of eligible voters in the geographic area from which districts are to be apportioned."[24] In the rest of that paragraph, Ms. Evenwel sets out the three-step logical progression that she believes compels that conclusion.[25] Such a conclusion, though, is not compelled, logical, or reasonable.

The first point in her argument is that these cases all rely on the plaintiffs' status as eligible voters as the foundation for Article III standing. It is certainly correct that the plaintiffs in each of the four cases were registered voters. The Court discussed their standing as voters because that was the way the case was presented, and those were the facts before the Court. Very likely the plaintiffs' attorneys made sure that the plaintiffs were registered voters in order to present the strongest case for standing.

---

[24] *Id.* at 26.

[25] *Id.*

The Court's discussion of the status of the plaintiffs who were before it and of the rights they asserted does not, however, require the conclusion that the only interests protected by the Constitution are those of the particular plaintiffs who brought those four cases. The limited issue presented in those four cases does not foreclose the possibility that children and non-citizens also have representation rights.

The second step leading to Ms. Evenwel's conclusion is that the injury in those cases was the denial of the right to an equally weighted vote. While the Court did discuss the right to an equally weighted vote, neither the Court nor Ms. Evenwel define how a vote's weight is to be determined. If it means that each voter in one district should have an equal ability to affect the outcome of an election as a voter in other districts, then equality would have to be based on turnout rather than the number of registered or potentially eligible voters. For example, if two districts have equal numbers of registered voters, but District A's voters turn out at twice the rate of District B's, then, under that theory, the votes cast in District B would have twice the weight as those in District A. On the other hand, an equally weighted vote could mean that each voter, no matter the district where he or she resided, would be casting a vote for the same thing – in this case, for a state senator

who represents roughly 811,000 persons or 1/31 of the state's population.[26]

The third step and final reason that Ms Evenwel says compels the conclusion that eligible voters constitute the relevant measure is her understanding that "in each case the Court remedied that constitutional violation by requiring the State to apportion districts in a fashion that ensured equal voting power."[27] It is not correct, however, that the remedies in the four cases involved equal numbers of voters rather than equal numbers of people. Because *Baker* considered only the justiciability issue, it did not address a remedy. *Gray*, which related to the election of Georgia's governor, required a state-wide election, which necessarily includes both all the population as well as all the voters. Thus, it is impossible to draw any conclusion regarding the population-based metric versus a voter-based measure. *Westberry*, which was decided under article I rather than the Equal Protection Clause, speaks of the constitutional objective of "making equal representation for equal numbers of people the fundamental goal for the House of Representatives."[28] The Court never said that districts must

---

[26] *See, e.g.*, *Westberry*, 376 U.S. at 2-3 (describing the plaintiffs' claim that unequal total population among districts deprived them of an equally weighted vote, and posing the issue in terms of members of Congress representing two or three times as many people as members from other districts).

[27] Brief of Appellants, at 26.

[28] *Westberry*, 376 U.S. at 47.

be constructed to contain equal numbers of voters, and, given the specific population-based language relating to congressional apportionment, it is doubtful that it would.

This brings us to *Reynolds*, the last of the four cases Ms. Evenwel claims "compels" the conclusion that an equal number of eligible voters is the metric. Indeed, *Reynolds* is by far the most relevant case, since it is the first case to find a one-person, one-vote requirement for legislative districts to be required under the Equal Protection Clause. Yet, *Reynolds* cannot be read as requiring that districts be drawn with equal numbers of voters. First, this Court's express language in *Reynolds* was, "[w]e hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[29] Later in its opinion, the Court said:

> By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an

---

[29] *Reynolds*, 377 U.S. at 568.

identical number of residents, or citizens, or voters.[30]

While one might conclude from the final sentence in the quoted passage that the Court recognized that voters might be a *permissible* apportionment base, the language of the Court does not countenance the Evenwel conclusion that the case *mandates* districts with an equal number of voters. By specifically listing apportionment designed to produce an equal number of residents, the Court, at the very minimum, anticipated that total population was a permissible apportionment metric.

B. The 1964 *Reynolds* Court could not have intended to mandate voter-based apportionment, since doing so would have had the effect of virtually eliminating African-Americans from the representation formula.

An even more conclusive indication that the *Reynolds* Court did not intend to impose a voter-based apportionment is the fact that such a system would have had the effect of largely ignoring the representation rights of the African-American population. *Reynolds* challenged the differing sizes of Alabama's state house and senate districts. The opinion was issued on June 15, 1964, at a time when the nation was well aware of the disenfranchisement of

---

[30] *Reynolds*, 377 U.S. at 577.

African-Americans in Alabama, Mississippi, and other states in the deep South. While the Court, like all well-informed Americans who followed the extensive news coverage,[31] would have known of Alabama's efforts to prevent African-Americans from registering to vote, it also would have been aware of that policy from at least one case it decided less than two years earlier. In October 1962 the Court granted certiorari and issued a summary, *per curiam* opinion affirming the authority of federal judges to order Alabama officials to register African-Americans whose applications to vote had been denied.[32] That case involved Macon County, which included Tuskegee and where 83 percent of the county's population was African-American.[33] The record reflected that the voter registration process required an in-person interview, and

---

[31] *E.g.*, E.W. Kenworthy, *Civil Rights Forces Assail Denial of Vote to Negro*, NEW YORK TIMES, Apr. 2, 1964, at 1 (discussing Senate debate on Civil Rights bill); Claude Sitton, *Negro Queue in Mississippi is Symbol of Frustration in Voter Registration Drive*, NEW YORK TIMES, March 2, 1964, at 20 (noting in Madison County, 72 percent of the residents are black, but African-American voter registration is only 1.1 percent, while white voter registration is 97 percent and how of approximately 1,000 African-American applicants in the voter registration drive, only 30 were successfully registered); *Negro Gain Slow in Winning Vote*, NEW YORK TIMES, Nov. 24, 1963, at 18 (noting that in rural areas where blacks often outnumber whites, African-Americans have little voting strength and using Dallas County (Selma), Alabama, as an example).

[32] *State of Alabama v. United States*, 371 U.S. 37 (1962) (*per curiam*).

[33] *State of Alabama v. United States*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962).

the registrars opened the office for those interviews only infrequently.[34] Whites were considered first without regard to when they put their name on the list, so that white applicants were all processed and routinely registered, while very few African-American applications were even processed. In fact, the record reflected if the registrars proceeded at the then-current rate of permitting only about eighteen African-American applicants to reach the registration desk in a year, it would take more than twenty years simply to interview those on the existing waiting list.[35] Even if African-American applicants were able to reach the application desk, they still had to take a writing test. Although the Alabama Constitution prohibited helping any applicant, registrars routinely and repeatedly assisted whites who were always approved, while they gave no assistance to African-American candidates who were rejected for trivial, if not phantom, mistakes.[36] The African-American candidates who were rejected for errors in the writing test included many with undergraduate and post-graduate degrees.[37] Ironically, Macon County, which was the subject of *State of Alabama v. United States*, may have had one of the better African-American voter registration records among the state's majority-black rural counties. In that 83-percent-African-American county, about a third of the registered

---

[34] *Id.* at 587 and n.12.

[35] *Id.* at 587.

[36] *Id.* at 587-88.

[37] *Id.* at 588.

voters were African-American.[38] By comparison, Dallas County, where Selma is located, had a non-white voting-age population of 15,115 in 1964, but only 320 non-white registered voters.[39] Neighboring Lowdes County with a non-white voting-age population of 5,122 had no non-white registered voters in 1964.[40] Wilcox County with a non-white voting-age population of 6,085, also had not a single African-American registered voter.[41]

While the *Reynolds* Court may not have been familiar with the registration statistics in each of the Alabama counties, it was well aware from the record in a case that had recently come before it of the extensive disenfranchisement of African-Americans in Macon County, Alabama. Like anyone who read the newspaper or watched the television news at that time, the members of the Court would have been well aware that Macon County was not an aberration and that disenfranchisement of African-Americans in Alabama, particularly in the rural, majority-black areas, was systematic and extremely effective. It is simply not conceivable that the Court would have mandated a voter-based apportionment system that

---

[38] *United States v. State of Alabama*, 192 F. Supp. 677, 687 (M.D. Ala. 1961), *aff'd*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd per curiam*, 371 U.S. 37 (1962).

[39] U.S. COMM'N ON CIVIL RIGHTS, *The Voting Rights Act: The First Months*, 1965, at 37.

[40] *Id.*

[41] *Id.*

would have had the effect of leaving disenfranchised African-Americans out of the apportionment formula.

C. This Court's post-*Reynolds* apportionment decisions do not compel or even suggest that voter-based, rather than population-based, districting is required.

The holding in *Reynolds* requires only that "a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."[42] To that end, both in *Reynolds* and the apportionment decisions that followed, this Court analyzed substantial equality – and therefore the constitutional sufficiency – of apportioned districts on the basis of total population with no accompanying analysis of voter population.[43] In determining the adequacy of a particular apportionment, the Court has long measured deviations of the resulting districts from the numerical

---

[42] *Brown v. Thomson*, 462 U.S. 835, 842 (1983), citing *Reynolds*, 377 U.S. at 577.

[43] *See, e.g.*, *Reynolds*, 377 U.S. at 540-41; *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 664-66 (1964); *Swann v. Adams*, 385 U.S. 440, 442 (1967); *Avery v. Midland County, Tex.*, 390 U.S. 474, 476 (1968); *Abate v. Mundt*, 403 U.S. 182, 184 (1971); *Gaffney v. Cummings*, 412 U.S. 735, 737 (1973); *Mahan v. Howell*, 410 U.S. 315, 318-19 (1973); *Connor v. Finch*, 431 U.S. 407, 416 (1977); *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 700 n.7 (1989).

ideal.[44] The Court arrives at the ideal district size, by dividing the total population, not the number of voters, by the number of districts. Thus, in those situations in which the Court has found that a particular apportionment scheme violates the Equal Protection Clause, it has generally done so when the scheme resulted in districts with meaningful deviations from the ideal district size as determined by total population, not eligible voters.

For example, not long after *Reynolds*, this Court decided *Swann v. Adams*, in which the Court evaluated the adequacy of apportionment of state legislative districts in terms of total population per elected official and found malapportionment on that basis rather than voter population.[45] Similarly, in *Avery v. Midland County*, the Court considered whether four county commissioner districts with total populations of 67,906, 852, 414, and 828, respectively, violated the Fourteenth Amendment.[46] *Avery* held that they did, and suggested no intent that districts needed to be reapportioned by eligible voters.[47] Rather, *Avery* simply directed that county commissioner seats not

---

[44] *See, e.g., Board of Estimate of City of New York*, 489 U.S. at 700 n.7 (identifying the formula used by this court "without exception since 1971").

[45] *Swann*, 385 U.S. at 444-45.

[46] *Avery*, 390 U.S. at 476.

[47] *Id.* at 484-85.

be apportioned among single-member districts of substantially unequal population.[48]

In a slight variation, *Hadley v. Junior College District of Metropolitan Kansas City, Missouri*, addressed an electoral system for junior college trustees in which districts were apportioned based on "school enumeration," defined as the number of persons between the age of 6 and 20 years who reside in the district.[49] This system is the antithesis of an "equal voter" system as it apportions trustees based on the number of a specific subset of the population, most of whom are unable to vote. Notably, though, *Hadley* did not take issue with the use of school enumeration as a population basis for apportionment.[50] Rather, the Court found the state-law apportionment formula unconstitutional because it did not apportion trustees in equal proportion to the school enumeration in the more populous districts and therefore contained a "built-in bias."[51]

These examples are emblematic of the Court's use of total population in measuring compliance with the principles announced in *Reynolds*. Thus, while

---

[48] *Id.* at 485-86.

[49] *Hadley v. Junior College Dist. of Metropolitan Kansas City, Mo.*, 397 U.S. 50, 51 (1970).

[50] *Id.* at 57 and n.9 (The Court recognized there was a question whether school enumeration figures, rather than actual population, were a permissible basis for apportionment but found no need to address the issue).

[51] *Id.*

this Court has reluctantly accepted other metrics, such as the number of registered voters, when they closely resemble population, neither *Reynolds* nor its progeny support the conclusion that Texas's apportionment based on total population is constitutionally unsound.[52] Rather, as this Court has explained, the decision of whether to include "aliens, transients, short-term or temporary residents, or persons denied the vote for convictions of a crime" in an apportionment base is a political question involving the nature of representation and therefore reserved to the states.[53] As such, Evenwel's conclusion that either *Reynolds* or the cases applying it compel equalization of voter population is without foundation in those precedents.

III. The original understanding of the Equal Protection Clause did not extend to voter-based apportionment.

A. The framers of the Fourteenth Amendment did not understand voter-based apportionment either to be a constitutional principle or to be the established standard for determining representation.

At the same time the 39th Congress was drafting the language of the Equal Protection Clause, it was

---

[52] *Burns v. Richardson*, 384 U.S. 73, 93 (1966).

[53] *Id.* at 92; *see also*, *Reynolds*, 377 U.S. at 586 ("Legislative reapportionment is primarily a matter for legislative consideration and determination.").

also approving an apportionment standard that was based on total population and that included children and non-citizens in the apportionment base for congressional seats. Both the Equal Protection Clause, which is found in section 1 of the Fourteenth Amendment, and the apportionment formula in section 2 were presented to the states and approved by them as part of the proposed Fourteenth Amendment.

While Ms. Evenwel dismisses the relevance of the framers' adoption of a congressional apportionment model that includes children and resident non-citizens as the "so-called federal analogy," she misses the point. This *amicus* does not suggest that section 2 of the Fourteenth Amendment applies to state legislative districts either directly or by analogy to the federal system. What it does suggest is that the consideration and adoption of section 2 establishes (1) there is no principle of voter-based apportionment enshrined in the Constitution and (2) one cannot legitimately suggest that the framers of the Equal Protection Clause in section 1 of the Fourteenth Amendment had any understanding that in doing so they were mandating a system of representation based on voters or potentially eligible voters rather than on population, since they had, at the same time and by using the same language – *i.e.*, defining the covered class by using the word "persons" – adopted a system based on total population as the apportionment metric and expressly rejected one based on potentially eligible voters. Section 2, by its terms, does not command the states to adopt a total-population measure as the apportionment standard

for state legislative districts, but it does strongly suggest that the framers had no understanding or intent that voters or potentially-eligible voters would be the required measure.

1. Section 2 of the Fourteenth Amendment was drafted in the context of shifting political power resulting from the end of the Civil War and the emancipation of the slaves as well as the differing ratio of voters to population among the loyal states.

The Fourteenth Amendment, which was drafted by the Congress and approved for submission to the states in 1866, included a collection of measures that dealt with the aftermath of the Civil War and the reentry of the seceded states. As finally approved, it had evolved to a measure that established the citizenship status of the recently-freed slaves, provided federal protection to them; reworked the apportionment formula for the House of Representatives in light of the now-meaningless three-fifths clause in article I, section 2; defined the political rights of the former Confederates; and repudiated the Confederate debt. At the time the proposals that eventually would become the Fourteenth Amendment were introduced, the Thirteenth Amendment freeing the slaves had been ratified and was part of the Constitution, but consideration and ratification of the Fifteenth

Amendment enfranchising the former slaves lay three and four years in the future.

Thus, when the Fourteenth Amendment was drafted and ratified, the slaves had been freed but had not been enfranchised, and there appeared to be little immediate likelihood that the formerly-seceded states would extend the franchise to blacks. Under the apportionment formula in article I, section 2, of the Constitution, the number of congressional seats assigned to the former slave states would increase because the newly-freed slaves, approximately four million in number,[54] now would be counted as whole persons rather than as three-fifths of a person. As a result, when the representatives of the seceding states were readmitted to the Congress, the loyal states, which were victorious in the bloody and costly Civil War, would see their political power diminished, while the political power of the vanquished southern states in the House of Representatives would be increased. This was acceptable to the ascendant Republicans, who then held strong majorities in the Congress, only if the freedmen could vote. That result both would reflect their policy goal of ensuring the freed slaves had legal and political equality with whites and would provide the Republicans an opportunity to make electoral inroads in the south as they anticipated the newly freed slaves would vote for the

---

[54] U.S. DEPT. OF THE INTERIOR, 1860 CENSUS OF POPULATION, at *vii* (1864); *Congressional Globe*, 39th Cong., 1st Sess., at 403 (Jan. 24, 1866).

party associated with emancipation.[55] Thus, one of the factors driving the ultimate form of section 2 was the need to tie the southern states' representation to the enfranchisement of the freedmen.

The other major issue affecting the ultimate form of the apportionment formula was the differing effect voter-based formulas and population-based formulas would have on different sections of the country. In particular, a shift from an apportionment system based on total population – as was included in the 1787 Constitution minus, of course, the fractional representation of slaves – to a voter-based standard would have reduced New England's representation at the expense of the western states.[56] Finding a formulation that addressed these two issues – both political and sectional – led to the final version of section 2.

2. The House was presented with both voter-based and population-based apportionment options.

Proposals to amend the Constitution to address the now-archaic three-fifths clause were introduced

---

[55] JOSEPH T. SNEED III, FOOTPRINTS ON THE ROCKS OF THE MOUNTAIN: AN ACCOUNT OF THE ENACTMENT OF THE FOURTEENTH AMENDMENT (1997) at *xiii-xiv*, 28. Judge Sneed's book appears to be privately published. The Library of Congress Catalog Card Number is 97-090651. *Also see*, HORACE E. FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 99 (The Johns Hopkins Press, 1908).

[56] Flack, at 102.

as early as the second and third days of the 39th Congress.[57] Both of these proposals used voters, not population, as the apportionment base. That simple formulation accomplished the primary goal of the Republican majority as it provided additional representation to the South resulting from counting the former slaves, but it did so only if the freedmen were enfranchised. About a month later, though, Maine congressman James Blaine spoke to urge the use of population rather than voters as the apportionment base. While he recognized and concurred in the rationale for using voters as the apportionment base – *i.e.*, "to deprive the lately rebellious States of the unfair advantage of a large representation in the House, based on their colored population, so long as that population shall be denied political rights by the legislation of those States" – he believed the disadvantages or, as he called them, the "evils" of using voters as the metric would abide long after the goal of enfranchisement of the former slaves had been realized.[58] He claimed that "population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot."[59] He also noted that "[t]he ratio of voters to population differs very widely in different sections, varying in the [nineteen free States] from a

---

[57] *Globe*, at 9, 10 (Dec. 5, 1865).

[58] *Id.* at 141 (Jan. 8, 1866).

[59] *Id.*

minimum of *nineteen per cent* to a maximum of *fifty-eight per cent.*"[60] This would result in states' existing level of representation falling if they had a low ratio of voters to population while states with a high ratio would gain congressional seats.[61] Using the population metric retained the standard used in the original version of the Constitution, minus the now-meaningless three-fifths clause. To accomplish the goal of denying increased representation to the former slave states so long as they withheld the ballot from the freedmen, Blaine proposed deleting the number of persons who were denied political rights or privileges on the basis of race or color from the apportionment base.[62] In other words, if the southern states denied the franchise to the freedmen, they would lose congressional seats.

---

[60] *Id.* (emphasis in original). The disparities Blaine identified in 1866 between using a population metric and a voter metric is several times greater than the ones complained of by Ms. Evenwel in the present day. The magnitude of the difference can be seen in his example of California and Vermont, which had roughly equal populations and three congressional seats each under the existing population-based apportionment. If a voter-based apportionment were used, though, post-Gold-Rush California, which had relatively few women and children, would be entitled to eight seats compared to equally populated Vermont's three. *Id.*

[61] *Id.*

[62] *Id.* at 142.

(a) The Joint Committee rejected the voter-based option and recommended passage of a population-based model.

Thus, with Blaine's January 8 proposal the issue was defined as being whether the apportionment metric should be voters or people. That issue was considered the next day by the Joint Committee on Reconstruction, a committee of nine representatives and six senators charged with considering matters relating to reconstruction and the admission of the senators and representatives from the states of the former confederacy. The committee's first order of business, other than organization matters, was consideration of a proposed constitutional amendment submitted by Pennsylvania's Thaddeus Stevens that would base apportionment on the number of legal voters in each state.[63] Four members of the committee offered substitutes for Stevens's voter-based metric. Two of the substitutes used a population metric, while the other two apportioned on the basis of citizens.[64] Faced with five competing formulations based variously on voters, citizens, or population, the committee took a test vote on the question of whether apportionment should be based on the number of voters. By a 6-8 vote, voter-based apportionment was

---

[63] BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1866-1867, New York (1914), at 41.

[64] Kendrick, at 43-44.

rejected, and the committee referred the apportionment issue to a subcommittee.[65]

The subcommittee gave the committee two alternatives, both of which based apportionment on the number of citizens. The committee chose one of the two to work with, and Rep. Conkling of New York moved to substitute "persons in each State, excluding Indians not taxed," to replace the reference to citizens. Conkling's amendment providing for population-based, rather than citizen-based, apportionment was adopted by a vote of 11-3, and subsequently the amended version was approved by a vote of 13-1 to be recommended to the two houses of the Congress. Thus, the committee, by formal votes, rejected voter-based apportionment, rejected citizen-based apportionment, and approved population-based apportionment to recommend to the House and Senate. It is important to note that, at this time and for roughly the next three months, the proposed constitutional amendment was limited to congressional apportionment – what is now found in section 2 of the Fourteenth Amendment. The full body of what is now the Fourteenth Amendment did not emerge until later in the process.

---

[65] Kendrick, at 45-46.

(b) The House debated the merits of both apportionment models and rejected the voter-based model while approving the population-based model.

Rep. Stevens reported the committee draft to the whole House of Representatives, and an extensive debate ensued.[66] The debate included tables and discussion showing how individual states would gain or lose representation with each of the different proposals.[67] Rep. Conkling argued that systems based on voters or male citizens over the age of 18 would exclude four-fifths of the population – *e.g.*, women and children – from representation even though they have been part of the apportionment formula since the adoption of the Constitution.[68] He also noted that "the number of aliens in some States is very large, and growing larger" and "many of the large States now hold their representation in part by reason of their aliens."[69] On the other hand, Ohio's Rep. Lawrence, a proponent of voter-based apportionment, argued that the committee proposal perpetuates a "political evil" by giving representation to women, children, and unnaturalized foreigners, all declared

---

[66] *Globe*, at 351 (Jan. 22, 1866).

[67] *E.g.*, *id.* at 357.

[68] *Id.* at 358.

[69] *Id.* at 359.

by the laws of the State unsafe or unnecessary depositaries of political power."[70]

Some of the debate touched on the apportionment of taxes as well as congressional seats, since the 1787 Constitution, as well as the proposed amendment, included both congressional seats and direct taxes in the same clause and apportioned them in the same way. During the week of the House debate, the proposal was referred back to the committee. As direct taxes had only infrequently been levied, the committee deleted that reference, which resulted in the issue that was finally presented to the House being solely one of congressional apportionment.[71] On January 31, the House voted on a substitute to the committee's recommended population-based model. The substitute would have apportioned seats "according to the number of male citizens of the United States over twenty-one years of age having the qualifications requisite of the electors of the most numerous branch of the State Legislature" – *i.e.*, – a voter-based model.[72] The motion to substitute was defeated by a vote

---

[70] *Id.* at 404 (Jan. 24, 1866), *see also* p. 405 (arguing against including women, children, and aliens in the apportionment base); p. 537 (Jan. 31, 1866) (Rep. Stevens noting that as many as 15-20 congressional seats in the northern states are founded upon non-citizens).

[71] Kendrick, at 58, 201; George P. Smith, *Republican Reconstruction and Section Two of the Fourteenth Amendment*, 23 WESTERN POL. Q. 829, 841-42 (1970); *Globe*, at 493-94 (Jan. 30, 1866).

[72] *Id.* at 535 (Jan. 31, 1866).

of 29-131, and the committee's proposed population-based model was adopted 120-46.[73] Thus, the House expressly rejected voter-based apportionment and approved population-based apportionment, both by overwhelming margins.

3. The Senate failed to achieve a two-thirds majority.

The joint resolution was debated intermittently in the Senate for about a month. Early in the debate, Senator William Fessenden of Maine, the Senate sponsor and Senate chair of the Joint Committee explained the objection to basing apportionment on voters rather than on population. He claimed that the "principle of the Constitution, with regard to representation is that it shall be founded on population."[74] Even though the franchise was limited at that time to males over the age of twenty-one, representation extended to persons of all ages, both male and female.[75] He stressed the inequality that resulted from the uneven distribution of voters among the states, and noted that the large number of foreigners in the states along the Pacific coast would be denied representation if apportionment were based on voters rather than population.[76] Later in the debate, Sen.

---

[73] *Id.* at 538.

[74] *Globe*, at 705 (Feb. 7, 1866).

[75] *Id.*

[76] *Id.*

Wilson of Massachusetts, a supporter of the resolution, noted how there were 3,856,628 unnaturalized persons of foreign birth in the loyal states and only 233,651 in the rebel states, so that changing the apportionment base to voters or citizens would cost Massachusetts, New York, Pennsylvania, and Ohio, among others, seats in the House of Representatives.[77] The impact of the different options was clearly presented, and the senators knew that a population model would include noncitizens, women, and children and that their inclusion or exclusion would have a varying effect from state to state.

When the matter first came to a Senate vote, though, the question of the apportionment model was not the overriding issue. Senator Charles Sumner of Massachusetts and his followers opposed the proposal because they wanted it to guarantee civil and political rights – *i.e.*, suffrage – to the freedmen.[78] Sumner, who led a hard-core group of about seven senators, was determined not to vote for the proposed constitutional amendment unless it extended the vote to the freedmen.[79] There was not, though, a majority in 1866 for congressional action extending the vote to blacks.[80] Thus, the proponents of the amendment faced opposition from those who believed the measure was too

---

[77] *Id.* at 1256 (March 8, 1866).

[78] *Id.* at 1287 (March 9, 1866).

[79] Robert Dale Owen, *Political Results from the Varioloid*, 35 ATLANTIC MONTHLY 660, 665 (June 1875).

[80] *Id.* at 663, 666; Sneed, at 146 n.421, 325.

harsh to the south and also from those, led by Senator Sumner, who felt it was not harsh enough.[81] As a result, then, there was not a two-thirds majority at that time.[82] After the vote on the measure received a majority but less than two-thirds, the matter went back to the Joint Committee, where it stayed for approximately two months.

4. A more comprehensive constitutional amendment emerged from the Joint Committee, but the requirement of population-based apportionment remained intact.

On April 28, 1866, the Joint Committee reported a new and expanded version of the proposed Fourteenth Amendment. What had originally been limited to the apportionment issue (essentially what is now found at section 2 of the Fourteenth Amendment) now was a much more comprehensive measure consisting of five sections including the Due Process and Equal Protection Clauses, provisions to temporarily disenfranchise persons who had voluntarily participated in the late insurrection, a prohibition on payment of the Confederate debt, and a section giving Congress the power to enforce the Amendment. There was some

---

[81] *Globe*, at 1281 (March 9, 1866).

[82] *Id.* at 1277 (noting that the whip-count showed the absence of the necessary votes); 1289 (showing a vote of 25-22 in favor of the joint resolution, which was less than the two-thirds required) (March 9, 1866).

tinkering with the language relating to not counting the freedmen in the apportionment formula if the southern states denied them the vote on the basis of race or color, but the language providing for population-based, rather than voter-based, apportionment was unchanged.

The House debated the revised proposal, and, as might be expected, the discussion focused on the new provisions and not the apportionment formula, which had previously been discussed. The House passed the measure by a vote of 128-37 on May 10 and sent the proposal to the Senate.[83]

5. The Senate, as the House had done earlier, overwhelmingly rejected voter-based apportionment and adopted a population-based system.

Unlike the House, the Senate had not previously taken a direct vote on the issue of whether apportionment should be by a population-based or a voter-based metric. During the debate, senators, both those supporting and those opposing the measure, made it clear that a population-based model would count women, children, and aliens in the apportionment base even though they were not entitled to vote.[84]

---

[83] *Id.* at 2545 (May 10, 1866).

[84] *E.g.*, *id.* at 2962 (June 5, 1866) (Sen. Poland (Vermont) noting the unfairness of a voter-based system giving greater weight to the new states, such as Nevada and Colorado, which

(Continued on following page)

They discussed the number of non-citizens who would be left out of the apportionment base if a voter-based model were used.[85] The senators also heard how different states would gain or lose representation depending on whether a population-based or voter-based model were used.[86] In short, the senators were well aware that a population-based model included, among others, non-voting women, children, and aliens in the apportionment base.

Wisconsin's Sen. Doolittle offered two motions to substitute language that would replace the Joint Committee's population-based metric with one based on voters.[87] Both were rejected by a vote of 7-31.[88] The

---

had an abundance of males as compared to Massachusetts or New York); 2986 (June 6, 1866) (Sen. Sherman (Ohio) arguing that a voter in Massachusetts with a preponderance of women and a voter in New York City with a large element of unnaturalized foreigners would count more than a voter anywhere else); 3027 (June 8, 1866) (Sen. Johnson (Maryland) complaining that aliens, women, minors, and persons who had participated in the rebellion would count in the apportionment base).

[85] *Id.* at 2944 (June 4, 1866) (Sen. Williams (Oregon) noting that the voter-based model would eliminate 400,000 unnaturalized foreigners from being counted when congressional seats are apportioned to the State of New York); 2986 (June 6, 1866) (Sen. Wilson (Massachusetts) characterizing the proposal to adopt a voter-based model as one "to strike from the basis of representation two million one hundred thousand unnaturalized foreigners in the old free States").

[86] *E.g.*, *id.* at 2943 (1866) (Sen. Doolittle (Wisconsin) explaining which states would lose and which would gain representation under a voter-based model).

[87] *Id.* at 2986 (June 6, 1866).

joint resolution proposing the amendment was then passed by the Senate on June 8 by a vote of 33-11,[89] the House concurred in the Senate amendments on June 13 by a vote of 120 to 32,[90] and the proposed amendment was submitted to the states.

B. The history of the consideration of the Fourteenth Amendment reveals that the drafters were well aware of the effects of both voter-based and population-based systems of apportionment and that they expressly and overwhelmingly rejected the voter-based metric in favor of apportionment on the basis of population.

The importance of the legislative history of the passage of the Fourteenth Amendment is not to suggest that some representative or senator's comments give us insight into how it should be interpreted. Instead, it shows what was before the members of the Congress when they voted and makes clear that they understood the difference between the voter-based and the population-based models. They knew that if they adopted a population-based model, women, children, and unnaturalized foreign-born residents would be counted. And they knew what

---

[88] *Id.* at 2986, 2991 (June 6, 1866).

[89] *Id.* at 3042 (June 8, 1866).

[90] *Id.* 3149 (June 13, 1866).

impact that would have on their state and on all the others. The history of the drafters' attempts to substitute one word or phrase for another reveals their keen awareness that words have meaning and that the words they adopted for the final text were chosen with care. The drafters knew that "citizens" defined a narrower class than "person" and that phrases designed to encompass eligible voters (*e.g.*, "male citizens of the United States over twenty-one years of age") were narrower still. They chose to write section 2 as they did because they knew that by choosing the word, persons, they were requiring a representation system based on population rather than voters.

An examination of the legislative process reveals that the issue of whether to adopt a voter-based system or a population-based system was squarely presented in the Joint Committee, in the House, and in the Senate. The voter-based system was rejected in the Joint Committee on a vote of 6-8, which was the only vote in the process that was remotely close. The Committee later considered a citizen-based model, which would have excluded aliens, but voted to substitute a population-based model by a vote of 11-3. In the House, the motion to substitute a voter-based model for the one based on population failed 29-131, and in the Senate failed by a vote of 7-31 – in both cases a margin of about 4.5 to 1. The voter-based model was directly, repeatedly, and overwhelmingly rejected.

Looking to the clear language of the Fourteenth Amendment, as well as to the history of its enactment, there is simply no provision in the Constitution for voter-based apportionment. The only place apportionment is addressed applies to congressional apportionment and mandates population-based apportionment. There is no provision in the text for the voter-based apportionment Ms. Evenwel claims is constitutionally mandated. Further, when the drafters of section 2 of the Fourteenth Amendment wanted to impose a population-based apportionment system, which they understood to include children and non-citizens, as well as others (*e.g.*, women who at that time were not permitted to vote), they drafted the provision to say that "the whole number of *persons*" would be counted. It is difficult to understand Ms. Evenwel's claim that in section 1 – in fact, in the immediately preceding sentence of the Fourteenth Amendment – those same drafters used the phrase "*any person*" in the Equal Protection Clause to mean only certain persons and, specifically, to require that children and resident non-citizens be excluded from section 1 protections. Indeed, this Court has previously looked to the language of section 2 of the Fourteenth Amendment for insight into what the drafters meant in section 1's Equal Protection Clause.[91] Here, by using the same word – *i.e.*, person – in both sections, it is reasonable to conclude they understood

---

[91] *Richardson v. Ramirez*, 418 U.S. 24, 55 (1974).

that word to have the same meaning in section 1 as in section 2.

Neither the text of the Fourteenth Amendment nor the original understanding of the language used support Ms. Evenwel's claim.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

VINCE RYAN
Harris County Attorney
HARRIS COUNTY, TEXAS
1019 Congress, 15th Floor
Houston, Texas 77002
(713) 755-5101
vince.ryan@cao.hctx.net

C. ROBERT HEATH
Counsel of Record
GUNNAR P. SEAQUIST
BICKERSTAFF HEATH
DELGADO ACOSTA LLP
3711 S. MoPac Expressway
Building One, Suite 300
Austin, Texas 78746
(512) 472-8021
bheath@bickerstaff.com
gseaquist@bickerstaff.com

Counsel for Amicus Curiae

No. 14-940

In The Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, in his official capacity as Governor of Texas; *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF HAWAII REAPPORTIONMENT CASE PLAINTIFFS (DAVID P. BROSTROM, ANDREW WALDEN) AS AMICI CURIAE SUPPORTING APPELLEES

ROBERT H. THOMAS
Counsel of Record
ANNA H. OSHIRO
MARK M. MURAKAMI
Damon Key Leong Kupchak Hastert
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. REPRESENTATIONAL EQUALITY IS THE OVERRIDING GOAL 8

A. Equal Protection—And Equal Representation—For "Persons" 8

B. Representational Equality Rules, Unless The State Meets A High Burden Of Justifying Electoral Equality 10

II. HAWAII REAPPORTIONMENT AND *BURNS* 12

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES

Burns v. Richardson, 384 U.S. 73 (1966) ..... *passim*

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001) 5, 7

Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996) 7

Davis v. Mann, 377 U.S. 678 (1964) 2, 16

Dunn v. Blumstein, 405 U.S. 330 (1972) 6, 15, 17

Eastern Railroad President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 11

Evans v. Cornman, 398 U.S. 419 (1970) 17

Franklin v. Massachusetts, 505 U.S. 788 (1992) 2-3

Garza v. Cnty. of Los Angeles, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991) 6, 11, 12

Graham v. Richardson, 403 U.S. 365 (1971) 9

Holt v. Richardson, 238 F. Supp. 468 (D. Haw. 1965) 14

TABLE OF AUTHORITIES—Continued

Page

In re Griffiths, 413 U.S. 717 (1973) 9

Kostick v. Nago, 960 F. Supp. 2d 1074 (D. Haw. 2013), *aff'd*, 134 S. Ct. 1001 (2014) 1, 4, 14, 16, 17

Lepak v. City of Irving, 453 Fed. Appx. 522 (5th Cir. 2011), *cert. denied*, 133 S. Ct. 1725 (2013) 7

Plyler v. Doe, 457 U.S. 202 (1982) 8

Reynolds v. Sims, 377 U.S. 533 (1964) 8, 10

Shaughnessy v. Mezei, 345 U.S. 206 (1953) 8

Solomon v. Abercrombie, 270 P.3d 1013 (Haw. 2012) 1-2

Travis v. King, 552 F Supp. 554 (D. Haw. 1982)..... 2, 14, 15, 16

Truax v. Raich, 239 U.S. 33 (1915) 9

Wesberry v. Sanders, 376 U.S. 1 (1984)..... 5

Wong Wing v. United States, 163 U.S. 228 (1896) 9

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 8, 9, 10

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONS AND STATUTES

U.S. Constitution

amend. XIV ..... *passim*

Hawaii Constitution

art. IV, § 4 ..... 1, 15

OTHER AUTHORITIES

Fishkin, Joseph, *Weightless Votes*, 121 Yale L.J. 1888 (2012) 6, 9-10

Goldfarb, Carl E., *Allocating the Local Apportionment Pie: What Portion for Resident Aliens?*, 104 Yale L. J. 1441 (1995)..... 10-11

Hitch, Thomas Kemper, *Islands in Transition: The Past, Present and Future of Hawaii's Economy* (Robert M. Kamins ed., 1993) 13

Hosek, James, *et al.*, *How Much Does Military Spending Add to Hawaii's Economy* (2011) http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR996.pdf 13, 14

Levinson, Sanford, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. Rev. 1269 (2002) 11

TABLE OF AUTHORITIES—Continued

Page

Manning, John, *The Equal Protection Clause in District Reapportionment: Representational Equality Versus Voting Equality*, 25 Suffolk U. L. Rev. 1243 (1991) 6-7

U.S. Census Bureau, *Residence Rule and Residence Situations for the 2010 Census* (2010) 3

U.S. Census Bureau, *Statistical Abstract of the United States: 2012 Table 400: Persons Reported Registered and Voted by State: 2010* (2010) 3

INTEREST OF AMICI CURIAE

Amicus curiae David P. Brostrom is a citizen, registered voter, and resident of the State of Hawaii.[1] He retired from the United States Army as a Colonel. Andrew Walden is also citizen, registered voter, and resident of the State of Hawaii. Amici were part of a coalition of military and civilian plaintiffs who challenged Hawaii's 2012 Supplemental Reapportionment Plan because it "extracted" from its population basis virtually all of the men and women serving in the Armed Forces and their families.[2]

Hawaii is one of the two states—Kansas being the other—which favors voting power over representational equality when reapportioning its state legislature. The Hawaii Constitution requires the Reapportionment Commission to only count "permanent residents"[3] in order to protect their electoral strength from being diluted by non-permanent residents, defined as those who have no intent to remain permanently in Hawaii.[4]

---

[1] Pursuant to Supreme Court Rule 37.6, amici curiae certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel for the parties have filed blanket consent to the filing of amicus briefs.

[2] *Kostick v. Nago*, 960 F Supp. 2d 1074 (D. Haw. 2013), *aff'd*, 134 S. Ct. 1001 (2014).

[3] Haw. Const. art. IV, § 4.

[4] *Solomon v. Abercrombie*, 270 P.3d 1013, 1022 (Haw. 2012) (Ordering the Hawaii Reapportionment Commission to "extract non-permanent military residents and non-permanent university student residents from the state's and the counties' 2010 Census population" because they "declare Hawaii not to be their

After this Court's decision in *Davis v. Mann*,[5] Hawaii could not expressly exclude Census-counted usual residents because they serve in the military. Hawaii no longer does so *de jure*,[6] but in the half-century since statehood, Hawaii has always managed to not count them, even though they and their families are counted by the Census only as Hawaii residents, they live and work here, and are an essential part of the fabric of the community. They can be represented in no state legislature but ours.[7] Although

---

home state."). The Commission did not ask anyone whether they intended to remain permanently in Hawaii, and made its extractions based on a series of presumptions: (1) it extracted active duty military personnel who indicated on a federal tax form that a state other than Hawaii should withhold state income taxes, (2) it extracted military spouses and children who were simply "associated" with an active duty servicemember, and (3) it extracted university students whose schools reported that they did not qualify for in-state tuition.

[5] *Davis v. Mann*, 377 U.S. 678, 691 (1964) ("We reject appellants' argument that the underrepresentation of Arlington, Fairfax, and Norfolk is constitutionally justifiable since it allegedly resulted in part from the fact that those areas contain large numbers of military and military-related personnel. Discrimination against a class of individuals, merely because of the nature of their employment, without more being shown, is constitutionally impermissible.").

[6] *See Travis v. King*, 552 F. Supp. 554, 558 & n.13 (D. Haw. 1982) (civilian population is not a permissible population base).

[7] The Census counts military servicemembers stationed within the United States as "usual residents" of the state where they are stationed. Those deployed outside the U.S. are counted as "overseas population" and attributed to a state. The Census counts "transients" such as tourists and servicemembers who are in-transit in their states of usual residence. The decennial Census has used the standard of "usual residence" since the first Congress. *Franklin v. Massachusetts*, 505 U.S. 788, 804-05 (1992). Usual residence "can mean more than mere physical

most servicemembers and their families were included in the Commission's first attempt in 2011 to adopt a districting plan, in 2012 the Hawaii Supreme Court voided that effort and ordered the Commission to extract them as "non-permanent military residents,"[8] which resulted in 108,767 Census-counted usual Hawaii residents—nearly 8% of Hawaii's total resident population of 1,360,301—being denied representation in Hawaii's legislature. At the same time, the Commission automatically included other persons whose inclusion diluted voting power, such as undocumented and documented aliens, prisoners, minors, and the hundreds of thousands of Hawaii residents who, although qualified, simply do not register or vote.[9]

In *Kostick*, amici and others who resided in districts with high populations of extracted military residents challenged the 2012 Plan because it denied equal representation. Hawaii had not demonstrated that its intent-to-reside-permanently criteria was both well-defined and uniformly applied, and was not simply a pretextual continuation of Hawaii's decades-long treatment of military personnel as political outland-

---

presence, and has been used broadly enough to include some element of allegiance or enduring tie to a place." *Id.* at 804. Currently, it is the "the place where a person lives and sleeps most of the time. It is not the same as the person's voting residence or legal residence." *See* U.S. Census Bureau, *Residence Rule and Residence Situations for the 2010 Census* (2010).

[8] *Solomon*, 270 P.3d at 1022.

[9] Hawaii has among the worst voter participation statistics in the country. By the time of the 2010 Census, Hawaii's record-high voter participation levels at statehood had plummeted to a dismal 48.3%. U.S. Census Bureau, *Statistical Abstract of the United States: 2012 Table 400: Persons Reported Registered and Voted by State: 2010* (2010).

ers. The District Court drew an unsupportable distinction between individual voting rights and the right to equal representation, and as a consequence refused to apply close constitutional scrutiny.[10] The court concluded Hawaii's "permanent resident" population basis was another way of saying "state citizen," and thus was subject to no more scrutiny than rational basis. The court concluded that Hawaii's assumptions about the intent of servicemembers, their families, and university students was rational, and designed to protect state citizens' voting power, which superseded the extracted persons' right to equal representation. To reach this conclusion, the District Court misread *Burns v. Richardson*,[11] in which this Court upheld Hawaii's first post-statehood reapportionment plan which counted registered voters and excluded military.

Today, nearly a half-century since *Burns*, Hawaii continues to exclude servicemembers, even though the facts which supported the case's conclusions have changed dramatically. Amici file this brief for a concurrent current view of how the case fares in the jurisdiction that spawned it, and to give a better understanding of the facts which supported this Court's analysis.

---

[10] *Kostick*, 960 F. Supp. 2d at 1091 ("The Supreme Court applies this higher standard to cases alleging infringement of the fundamental right to vote, in contrast to equal representation or equal voting power challenges in the context of reapportionment. In practice, the standard for this latter category approximates rational-basis review.").

[11] *Burns v. Richardson*, 384 U.S. 73, 91-92 (1966).

SUMMARY OF ARGUMENT

The parties in this case suggest answers to a deceptively simple question: who constitutes the body politic in the states? This question is one the Court has avoided answering explicitly for nearly half a century.[12] Amici respectfully suggest that the Court may continue to do so, but at the same time should provide guidance to state legislatures and reapportionment commissions by holding that it is always *permissible* under the Equal Protection Clause for states—like Texas and 47 others—to include all Census-counted usual residents in their reapportionment populations, even when this means that non-citizens and non-voters are represented in state legislatures as equally as citizens of voting age. Doing so upholds the first and overriding principle of the Equal Protection Clause, representational equality.[13] At first blush, it may seem odd to conclude that those who are not United States citizens and those who are not eligible to vote, are deserving of representation in our state legislatures—at least until one reads the text of the Equal Protection Clause and studies its subsequent history and understands that elected officials represent all "persons," not only citizens or those who can elevate them to office.

---

[12] *See id. at* 73, 91-92; *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000), *cert. denied*, 532 U.S. 1046 (2001) (Thomas, J., dissenting from denial of certiorari) ("We have never determined the relevant 'population' that States and localities must equally distribute among their districts.").

[13] Congressional apportionment requires use of total population. *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1984) ("the People" means everyone).

But this Court has never required states to apportion their legislatures using total population, although it is "the de facto national policy."[14] Thus, amici also note that the Equal Protection Clause and the "one-person, one-vote" principle do not *require* that a state include non-citizens and non-voters in the reapportionment population, if a state chooses to favor the voting equality principle instead of representational equality. What the Equal Protection Clause requires is that if a state decides to do so, it must meet a more exacting standard than the "rational basis" test. Thus, if a state bases reapportionment on some population other than total Census-counted usual residents, it must under *Burns* demonstrate that the resulting plan is "substantially similar" to one based on a "permissible population basis" such as total population, state citizens, or U.S. citizens.[15] It does so by employing "[a]n appropriately defined and uniformly applied requirement"[16] when deciding whom to count and whom to exclude.

This issue has been addressed in various ways by the lower courts. The Ninth Circuit favors representational equality over voting power and requires use of total population,[17] while the Fourth and Fifth Cir-

---

[14] Joseph Fishkin, *Weightless Votes*, 121 Yale L.J. 1888, 1891 (2012).

[15] *Burns*, 384 U.S. at 93.

[16] *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

[17] *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). In that case, the Ninth Circuit held total population is required if counting a lesser population results in dilution of representational equality, "because equal representation for all persons more accurately embodies the meaning of the fourteenth amendment." John Man-

cuits, allow states to freely choose whom to count and whom, or whether, to exclude.[18] In other words, the Ninth Circuit held that states *must* use total population, while the Fourth and Fifth Circuit held they merely *may*. Amici do not suggest that states must use one or the other, but urge a more pragmatic rule: they ask this Court to hold that if a state chooses to include less than all of its Census-counted usual residents, then a reviewing court must apply heightened scrutiny and the state should be required to show a well-defined and uniformly applied standard supporting its choice and prove that it approximates a plan that is based on a "permissible population basis" such as total population or U.S. or state citizens, before it may to deprive any person—voter or not, citizen or not—of representational equality. In the absence of such a compelling showing, states must use the total Census-counted population as their reapportionment population basis.

---

ning, *The Equal Protection Clause in District Reapportionment: Representational Equality Versus Voting Equality*, 25 Suffolk U. L. Rev. 1243, 1244 (1991) (footnote omitted).

[18] *Lepak v. City of Irving*, 453 Fed. Appx. 522 (5th Cir. 2011) (equal protection does not prohibit use of total population and does not require counting citizen voting-age population), *cert. denied*, 133 S. Ct. 1725 (2013); *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000) (counting total population is rational), *cert. denied*, 532 U.S. 1046 (2001); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996) (electoral equality not necessarily superior to representational equality).

ARGUMENT

I. REPRESENTATIONAL EQUALITY IS THE OVERRIDING GOAL

A. Equal Protection—And Equal Representation—For "Persons"

Choosing whom to count when reapportioning state legislatures goes to the very heart of representative government because it determines who is included in "We the People." From the Preamble to the Fourteenth Amendment's Equal Protection Clause, our traditions and this Court's rulings have viewed "person" expansively, culminating with *Reynolds v. Sims*, which held that state reapportionment must be accomplished so that districts are "as nearly of equal population as is practicable."[19]

The Equal Protection Clause provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."[20] This is "not confined to the protection of citizens."[21] This Court has long held that the Equal Protection Clause's protections are "universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, or color, of nationality;

---

[19] *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

[20] U.S. Const. amend. XIV, § 1.

[21] *Plyler v. Doe*, 457 U.S. 202, 212 (1982).

and the protection of the laws is a pledge of the protection of equal laws."[22]

This Court maintains that the Fourteenth Amendment was drafted to include "aliens unlawfully present," as it was "designed to afford its protection to all within the boundaries of a State."[23] The Court holds that "[s]ince an alien[,] as well as a citizen is a 'person,' for equal protection purposes," both are "entitled to the equal protection of the laws of the State in which they reside."[24] There are "literally millions of aliens within the jurisdiction of the United States," and the Fifth and Fourteenth Amendments protect "every one of those persons from deprivation of life, liberty, or property without due process of law."[25] The Court reasons that aliens are entitled to protections because they, like citizens, "pay taxes, support the economy, serve in the Armed Forces, and contribute in a myriad of other ways to our society."[26] The same rationale supports representational equality for all persons regardless of their eligibility to vote, since "each [state] legislator ought to be responsible for

---

[22] *Id.* (quoting *Yick Wo v. Hopkins*, 118 U.S 356, 369 (1886)). "Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler*, 457 U.S. at 212 (citing *Yick Wo*, 118 U.S. at 369; *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953)).

[23] *Id.* (citing *Wong Wing v. United States*. 163 U.S. 228, 238 (1896)).

[24] *Graham v. Richardson*, 403 U.S. at 371-75 (citing *Yick Wo*, 118 U.S. at 369; *Truax v. Raich*, 239 U.S. 33, 39 (1915)).

[25] *Mathews v. Diaz*, 426 U.S. 67, 77 (1976).

[26] *In re Griffiths*, 413 U.S. 717, 722 (1973).

bringing resources home to roughly the same number of persons. Children—and for that matter resident aliens—need roads, bridges, schools, and Teapot Museums as much as the rest of us do, if not more."[27]

B. Representational Equality Rules, Unless The State Meets A High Burden Of Justifying Electoral Equality

This Court should affirm the primary place of representational equality in the Equal Protection canon. Although "one-person, one-vote" suggests that equality of voting power is the goal, the text of the Equal Protection Clause itself ("any person"), and this Court's decisions reveal the representational equality principle is its indispensable purpose.[28] As one commentator noted:

> The court-ordered apportionment plan showed how two prized American values, electoral equality and equal representation, can conflict in areas with large noncitizen populations. Electoral equality rests on the principle that the voting power of all eligible voters should be weighted equally and requires drawing voting districts to include equal numbers of citizens. The slightly different concept of equal representation means ensuring that everyone—citizens and noncitizens alike—is represented

---

[27] Fishkin, *Weightless Votes*, 121 Yale L. J. at 1907 (footnote omitted).

[28] *See, e.g.*, *Reynolds* 377 U.S. at 560-61 ("the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State"); *Yick Wo*, 118 U.S. at 359 (aliens guaranteed equal protection).

> equally and requires drawing districts with equal numbers of residents. Equal representation is animated by the ideal that all persons, voters and nonvoters alike, are entitled to a political voice, however indirect or muted.[29]

This means that *persons*—not "permanent residents," "voters," or the "citizen voting age population"—are presumptively entitled to be represented equally in every state's legislature.

This is especially important in districts such as those in which amici reside which contain large populations of residents who are not counted in reapportionment. Hawaii's extraction of military personnel forces amici to compete with more people to gain the attention of their representative than those in other districts. Every person residing in a state has a right to be represented in the legislature regardless of their citizenship or voting status, and "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[30]

Appellants' theory's unjustifiable defect is that it takes little account of the guarantee that all residents of state are entitled to be represented equally in the legislature, and if voting power conflicts with repre-

---

[29] Carl E. Goldfarb, *Allocating the Local Apportionment Pie: What Portion for Resident Aliens?*, 104 Yale L. J. 1441, 1446-47 (1995) (footnotes omitted).

[30] *Garza*, 918 F.2d at 775 (quoting *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961)). *See also* Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. Rev. 1269, 1281 (2002) (each representative should have equal numbers of constituents).

sentation, the Equal Protection principle that "government should represent *all* the people"[31] should predominate unless the state can demonstrates a compelling reason to favor voting equality.

II. HAWAII REAPPORTIONMENT AND *BURNS*

Burns, like all reapportionment cases, was a decision driven by the circumstances existing at the time, and the Court's conclusion was based on a factual situation vastly different than that presented today. Thus, to aid the Court in better understanding how the case should be considered, this portion of the brief provides an overview of *Burns*' background facts, and how it is interpreted in the jurisdiction where it originated.

Fifty years ago, this Court agreed that Hawaii's military was mostly transient.[32] There was no dispute then that Hawaii at the time had a "special population problem" due to large concentrations of military and "other transient populations," and "the military population in the State fluctuates violently as the Asiatic spots of trouble arise and disappear."[33] The preceding 25 years had witnessed massive population swings as draftees flowed in and out of Hawaii during World War II, the Korean conflict, and the early days of Vietnam. For example, at the peak of World War II, 400,000 servicemembers comprised nearly 50% of Hawaii's population.[34] By 1950 that number had

---

[31] *Garza*, 918 F.2d at 774.

[32] *Burns*, 384 U.S. at 94.

[33] *Id.*

[34] *Id.* at 94 n.24.

shriveled nearly twenty-fold to 21,000. It then swelled again during the Korean conflict.[35]

But Hawaii's "special population problem" of fifty years ago no longer exists, and today's servicemembers and their families cannot be so casually presumed to be "transients." The military is vastly different, and our all-volunteer force has served worldwide with no violent swings in Hawaii's military population even remotely comparable to the twenty-fold surge confronting the Court in *Burns*.[36] The military is no longer separate from the community. Servicemembers own and rent homes and apartments offbase. Many pay property taxes. They patronize businesses in the community and pay Hawaii General Excise Tax. Their families work in the community and pay Hawaii income taxes. Their children attend Hawaii public and private schools, and their families use and pr[illegible] for roads and other services. They serve as elected officials on Neighborhood Boards. Their presence brings an additional seat to Hawaii in the U.S. House of Representatives. Hawaii politicians aggressively pursue the massive economic benefits their presence brings, and campaign on the promise of maintaining the flow of federal dollars from Washington that come with it. A study prepared for the Secretary of Defense estimated the military's presence in-

---

[35] *See* Thomas Kemper Hitch, *Islands in Transition: The Past, Present and Future of Hawaii's Economy* 199 (Robert M. Kamins ed., 1993).

[36] *See* James Hosek, *et al.*, *How Much Does Military Spending Add to Hawaii's Economy* 28 (2011) (http://www.rand.org/content/dam/rand/pubs/technical_reports/2011/RAND_TR996.pdf).

jects $12 billion into the state, comprising nearly 18% of Hawaii's economy.[37]

Kostick was merely the latest chapter in a long-standing and continuous reapportionment controversy that began in 1959 when Hawaii joined the Union. The ink was barely dry on the Admissions Act when the new state began excluding servicemembers from its reapportionment population, and since that time, Hawaii has always found a way to avoid including military personnel as part of its state apportionment population.[38]

Initially, it counted registered voters, which excluded most servicemembers because generally, they did not register to vote in Hawaii.[39] In *Burns*, this Court upheld that count, but only because there was no showing that counting registered voters resulted in a plan different than one based on a "permissible population basis" such as total population, state citizens, or U.S. citizens.[40] The Court held there was no proof the plan based on registered voters was different than a plan based on "state citizens," or total population.[41] If it satisfies that burden, the state's decision about whom to count "involves choices about the nature of representation."[42] The Court identified several

---

[37] *Id.* at 21.

[38] Servicemembers are counted as part of Hawaii's population for purposes of Congressional apportionment, and the military's presence aids Hawaii in achieving an additional seat in the House of Representatives. *Travis*, 552 F. Supp. at 571.

[39] *Holt v. Richardson*, 238 F. Supp. 468, 470-71 (D. Haw. 1965).

[40] *Burns*, 284 U.S. at 93.

[41] *Id.* at 94-95.

[42] *Id.* at 92.

permissible population bases, but noted it "carefully left open the question what population was being referred to" when it required substantial "population" equality.[43] This was a time when 87.1% of Hawaii's voting-age population registered to vote, the highest percentage in the nation, so there was a high correlation among registered voters, total population, and state citizens.

By 1982, however, voter registration and participation numbers had declined so precipitously that the registered voter population no longer was a valid proxy for either state citizens or total population, and plans based on registered voters and "civilians" were invalidated.[44] *Burns* also noted that states need not include "aliens, transients, short-term or temporary residents, or persons denied the vote."[45] As a consequence, in 1992 Hawaii amended its constitution to count "permanent residents."[46]

Therefore, a state may choose to count nearly any population, provided it proves the resulting plan advances equal protection principles. However, the more the alternative basis strays from one that is "appropriately defined and uniformly applied,"[47] and the more subject to manipulation it is, the more scrutiny a court should apply. *Burns* established a three-

---

[43] *Id.*

[44] *Travis*, 552 F. Supp. at 558. The District Court's opinion details the multiple challenges to Hawaii's reapportionment over the years. *Id.* at 556 & n.2 (noting "numerous attacks in both state and federal courts").

[45] *Burns*, 284 U.S. at 92.

[46] Haw. Const. art. IV, § 4.

[47] *Dunn*, 405 U.S. at 343.

part test a state must meet if it chooses to count less than its entire Census usual resident population.

First, it must identify the permissible population basis to which its reapportionment population is to be compared. *Burns* identified total population, U.S. citizens, and state citizens as permissible population bases, noting that the 1950 Hawaii constitutional convention discussed total population, state citizens, and registered voters as possible baselines.[48] The 1950 convention concluded that counting registered voters would be "a reasonable approximation of both citizen and total population."[49] Registering to vote after all, is certainly strong indicia of state citizenship, however that term might be defined.[50]

Second, the state must demonstrate that using its alternative population basis results in a plan that is a "substantial duplicate" of one based on the identified permissible population basis.

Finally, it must show that the classification is not "one the Constitution forbids."[51] For example, a count of "civilians" is prohibited.[52] In *Kostick*, Hawaii's rejection of the extracted classes' personhood was more subtle: lurking behind the facially-neutral test of "permanent resident" was Hawaii's exclusionary his-

---

[48] *Burns*, 284 U.S. at 93.

[49] *Id.*

[50] *Id.* Hawaii has never been able to define "state citizen." Despite this, the District Court in *Kostick* concluded that "permanent resident" was an approximation of "Hawaii citizen," a classification which *Burns* held was subject only to rational basis review.

[51] *Id.* at 93-94.

[52] *Davis*, 377 U.S. at 691; *Travis*, 552 F. Supp. at 558 & n.13.

tory, which, if heightened scrutiny were applied, would have revealed that the 2012 Plan was not the product of a disinterested search for transients, but was targeted at servicemembers and their families, and students. Similar concerns may animate the case at bar, where an apparently facially-neutral standard could be employed to favor one group over another if a higher standard of review were not applicable if the states are permitted to count less than everyone. A population basis that on its face may be neutral invites heightened scrutiny when, like Hawaii, it somehow always results in a narrow class being excluded. In *Evans v. Cornman*,[53] this Court explained how courts should evaluate claims of nondiscrimination, holding that Maryland could not prohibit residents of a federal enclave from registering to vote in Maryland as residents; the Court rejected the state's claim that the enclave residents lacked an interest in state politics simply because they resided on federal property. The same holds true for non-citizens, those ineligible to vote, and the military in Hawaii.

Under the Equal Protection test of *Dunn v. Blumstein*,[54] these factors are evaluated by reviewing the classification by placing the burden squarely on the state to prove a "substantial and compelling reason"[55] for a less-than-Census-count, which supports "[a]n appropriately defined and uniformly applied requirement."[56] When fundamental rights such as the right to equal representation and the right to petition

---

[53] 398 U.S. 419 (1970).

[54] 405 U.S. 330, 335 (1972).

[55] *Id.* at 336.

[56] *Id.* at 342.

on an equal basis are impacted, the courts should apply "close constitutional scrutiny," and not mere rational basis.

The purpose of the *Burns* test is to protect equal protection principles by forcing the state to justify its choice of population basis if it counts less than all residents and does so by applying vague and underinclusive standards which are based on assumptions. Appellants' preference for voting equality over representational equality should be subject to these standards.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted.

ROBERT H. THOMAS
Counsel of Record
ANNA H. OSHIRO
MARK M. MURAKAMI
Damon Key Leong Kupchak Hastert
1003 Bishop Street, 16th Floor
Honolulu, Hawaii 96813
(808) 531-8031
rht@hawaiilawyer.com

Counsel for Amici Curiae

SEPTEMBER 2015.

No. 14-940

Supreme Court, U.S.
FILED
SEP 25 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF *AMICUS CURIAE* CARL E. HEASTIE IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NEW YORK STATE ASSEMBLY IN SUPPORT OF APPELLEES

C. DANIEL CHILL
Counsel of Record
ELAINE M. REICH
GRAUBARD MILLER
405 Lexington Avenue, 11th Floor
New York, New York 10174
(212) 818-8800
dchill@graubard.com
Counsel for Amicus Curiae

Dated: September 2015

260963

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Is Citizen Voting Age Population the only constitutional metric by which state legislative districts can be apportioned?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS..... ii

TABLE OF CITED AUTHORITIES iv

INTEREST OF THE *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT.....2

INTRODUCTION.....3

ARGUMENT.....4

I. Aliens are Accorded Extensive Constitutional Rights and Protections.. 4

II. The Exclusion of Aliens from the Population Base Upon Which Districts are Drawn Denies Them Their Constitutional Right to Access to Government.....5

III. States are Accorded Latitude in Their Choice of an Apportionment Base.....7

IV. CVAP is Not a Panacea and Its Use Will Have a Retrogressive Impact on New York's Minority Community.....9

Table of Contents

Page

V. The Deviation Permitted in State Districting Should Be Measured by Reference to the Permissible Population Base Chosen by the State. 11

CONCLUSION 12

APPENDIX A — NEW YORK STATE LAWS/ RULES PROVIDING IMMIGRANTS' NYS STATE SERVICES/RIGHTS 1a

APPENDIX B — NYS RIGHTS FOR UNDOCUMENTED IMMIGRANTS 10a

TABLE OF CITED AUTHORITIES

Page

Cases

Benal v. Fainter,
467 U.S. 216 (1984) 4

Brown v. Thomson,
462 U.S. 835 (1983) 11

Burns v. Richardson,
384 U.S. 73 (1966) 2, 7, 8, 11

Chen v. City of Houston,
532 U.S. 1046 (2001) 11

Connor v. Finch,
431 U.S. 407 (1977) 11

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961) 2, 5

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1990) 5-6

Graham v. Richardson,
403 U.S. 365 (1971) 5

In re Griffiths,
413 U.S. 717 (1973) 4, 6

Mahan v. Howell,
404 U.S. 1201 (1971) 11

Cited Authorities

Page

Mathews v. Diaz,
426 U.S. 67 (1976) 5

Nyquist v. Mauclet,
432 U.S. 1 (1977) 4

Plyler v. Doe,
457 U.S. 202 (1982) 4

Reynolds v. Sims,
377 U.S. 533 (1964) 9

Sugarman v. Dougall,
413 U.S. 634 (1973) 4, 8

Thornburg v. Gingles,
478 U.S. 30 (1986) 9

Wong Wing v. U.S.,
163 U.S. 228 (1896) 4, 5

Yick Wo v. Hopkins.
118 U.S. 356 (1886) 4

Statutes and Other Authorities

United States Constitution, amend. I 2, 6

United States Constitution, amend. XIV 2, 4, 6, 8

United States Constitution, amend. XIV, § 2 8

Cited Authorities

Page

Voting Rights Act, § 2 10

Sup. Ct. R. 37.2(a) 1

Sup. Ct. R. 37.6 1

Byran Baker and Nancy Rytina, *Estimates of the Lawful Permanent Resident Population in the United States: 2013* 3

Jens Manuel Krogstad and Jeffrey S. Passel, *"5 facts about illegal immigration in the U.S."* 1

Office of Immigration Statistics, Policy Directorate, U.S. Department of Homeland Security (September 2014), *http://www.dhs.gov/publication/estimates-lawful-permanent-resident-population-213* 3

Pew Research Center, Washington, D.C., July 24, 2015, *http://www.pewresearch.org/fact-tank/2015/07/24/5-facts-about-illegal-immigration-in-the-u-s/* 1

INTEREST OF THE *AMICUS CURIAE*

Carl E. Heastie is Speaker of the New York State Assembly. As such, he is the legislative leader of the Assembly, one of two houses of New York's bicameral State legislature. Speaker Heastie respectfully submits this *amicus* brief in his official capacity on behalf of the New York State Assembly.[1]

New York has a substantial immigrant population. As of 2014, New York was one of six states which together account for 60% of unauthorized immigrants in the United States. Jens Manuel Krogstad and Jeffrey S. Passel, *"5 facts about illegal immigration in the U.S."* Pew Research Center, Washington, D.C., July 24, 2015, *http://www.pewresearch.org/fact-tank/2015/07/24/5-facts-about-illegal-immigration-in-the-u-s/*. In addition, there are numerous documented immigrants resident in New York State. New York has enacted a host of legislation providing rights and services to its documented immigrant population (*see* Appendix A), as well as to its undocumented immigrant population (*see* Appendix B). The case is of interest to the New York State Assembly because the Assembly is concerned with the preservation

---

1. Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. The blanket consents of Appellants and Appellees to the filing of *amicus* briefs has been noted on the docket by the Clerk of the Court.

Pursuant to this Court's Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or his counsel made a monetary contribution to the brief's preparation or submission.

and advancement of the rights and protections of the State's immigrant population.

SUMMARY OF ARGUMENT

Aliens are persons within the meaning of the Constitution and enjoy constitutional rights and protections. Excluding aliens from the population base from which state legislative districts are constructed would deny them constitutional rights guaranteed under the First and Fourteenth Amendments by effectively denying them access to government. Notwithstanding the fact that aliens cannot vote, they are persons with a stake in government. In a representative democracy as embodied in our Constitution, the government acts on behalf of the people. And people cannot be adequately represented if they are unable to make their wishes known to their representatives. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Eliminating non-citizens from the apportionment metric will debase their political capital. Representatives will have no incentive to advocate for immigrants if they are not even considered in the constituent base. The current political discourse in the United States leaves no doubt that this is a particularly perilous time for immigrants.

The choice whether to include or exclude non-citizens from the apportionment base is one left to the states. States are free to choose the metric by which their internal districts are apportioned so long as the metric is a constitutional one. *Burns v. Richardson*, 384 U.S. 73, 92 (1966). The Constitution, in the Fourteenth Amendment, prescribes total population as the basis for apportioning Congressional districts. The notion that it

is unconstitutional for a state to choose a population base that the Constitution itself countenances defies logic.

Constructing districts on the basis of Citizen Voting Age Population ("CVAP") will adversely impact New York's minority population. Excluding non-citizens from the districting base results in fewer persons available to populate each district. Since the Voting Rights Act mandates that a cohesive, compact minority population be aggregated into a single district, the absence of non-citizens to fill out district population in minority communities results in the retrogressive outcome of fewer minority districts. In fact, the elimination of non-citizens from New York's districting base would harm minorities protected by the Voting Rights Act by significantly diminishing their voting strength to the benefit of the white majority population.

INTRODUCTION

Immigrants comprise a substantial portion of the population of the United States. The Department of Homeland Security reports that on January 1, 2013 there were an estimated 13.1 million lawful permanent resident aliens in the United States. Byran Baker and Nancy Rytina, *Estimates of the Lawful Permanent Resident Population in the United States: 2013*, Office of Immigration Statistics, Policy Directorate, U.S. Department of Homeland Security (September 2014), available at *http://www.dhs.gov/publication/estimates-lawful-permanent-resident-population-213*, at 3. In addition, Pew Research Center puts the number of illegal aliens in the United States in 2014 at 11.3 million. Pew, *supra*, at 2146. Thus, the Court's determination in this case will impact nearly 25 million people.

ARGUMENT

I. Aliens are Accorded Extensive Constitutional Rights and Protections

For more than a century, this Court has recognized aliens as "persons" within the meaning of the Constitution and accorded them constitutional rights and protections. *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886) (Petitioners' "rights [under the Constitution] . . . are not less because they are aliens. . . ."). *Accord*: *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the *Fifth* and *Fourteenth* Amendments."); *Wong Wing v. U.S.*, 163 U.S. 228, 238 (1896) ("all persons within the territory of the United States are entitled to the protection guaranteed by [Constitutional] amendments . . . even aliens. . . .").

Thus, a vast breadth of constitutional protections are accorded to aliens. E.g., *Benal v. Fainter*, 467 U.S. 216 (1984) (holding statute denying aliens the opportunity to become notaries public violative of Equal Protection clause of Fourteenth Amendment); *Plyler*, supra (invalidating under Fourteenth Amendment state statute denying undocumented alien children enrollment in public school); *Nyquist v. Mauclet*, 432 U.S. 1 (1977) (holding unconstitutional state statute denying state financial assistance for education to aliens); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (invalidating statute prohibiting employment of aliens as state civil servants); *In re Griffiths*, 413 U.S. 717 (1973) (declaring unconstitutional

state prohibition of aliens from taking bar examination); *Graham v. Richardson*, 403 U.S. 365 (1971) (striking on constitutional grounds state statute imposing minimum residency requirements for welfare benefits for aliens).

Indeed, this Court has long held that classifications by a state based on alienage are "inherently suspect and subject to close judicial scrutiny." *Graham*, 403 U.S. at 372; *Mathews v. Diaz*, 426 U.S. 67 (1976); *Wong Wing*, *supra*.

II. The Exclusion of Aliens from the Population Base Upon Which Districts are Drawn Denies Them Their Constitutional Right to Access to Government

Appellants' insistence that the only constitutionally sound base for the construction of voting districts is CVAP ignores, and may well jeopardize, the constitutional rights of aliens, which this Court has zealously guarded. Under such a scenario, non-citizens' access to government would be severely undercut, if not rendered illusory.

This Court has recognized that "[i]n a representative democracy such as this [of the United States] . . . [the] branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Eastern Railroad*, 365 U.S. at 137. And the "right to petition is an important corollary to the right to be represented. Non-citizens are entitled to various federal and local benefits . . . As such, they have a right to petition their government for services and to influence how their tax dollars are spent." *Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990)

(citation omitted). Inasmuch as aliens are people under the Constitution, "[t]o refuse to count people [including aliens] in constructing a districting plan ignores these [constitutional] rights. . . ." Id.

The right to petition government is a classic constitutional right under the First and Fourteenth Amendments. The current political discourse underscores the peril aliens face today. As this Court has observed, "[r]esident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in myriad other ways to our society." *Griffiths*, 413 U.S. 722. Undocumented aliens also support the economy, contribute to our society and pay tax. If non-citizens are eliminated from the districting base, they will have lost their political capital and elected representatives will have no incentive to pay them heed. Aliens will be subject to taxation without representation in contravention of the fundamental tenet on which the Revolutionary War was fought and our nation was founded. Since aliens serve in the Armed Forces, they can be sent to theaters of war where they can be killed or maimed. Yet, this Court is being asked to give aliens no voice in respect to the decisions of elective representatives as to these and other matters which so profoundly impact them.

The issue is not *equal* access, as Appellants would have it. The analysis is whether, as a matter of the Constitution, aliens are entitled to *any* representational access. We do not assert that aliens have an entitlement to representational access equal to that of a citizen. Rather, we submit that aliens must be accorded some degree of access, even if not equal, so their voices will be heard on matters of critical impact. It would be entirely incongruous

to impose citizen-like burdens on aliens (taxation, military service) but to silence their representational voice in government. Allowing aliens to be part of the districting base would accord them at least a partial degree of government access which the Constitution affords them.

III. States are Accorded Latitude in Their Choice of an Apportionment Base

While it is true that *Burns v. Richardson*, 384 U.S.73 (1966), stands for the proposition that districts are not required to be apportioned on the basis of total population, *Burns* does not hold that total population cannot be a valid basis for districting, or that some other metric must be used instead. *Burns* unequivocally states:

> Neither in *Reynolds v. Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or person denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the *Equal Protection Clause* is to be measured. *The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf, e.g., Carrington v. Rash, 380 U.S. 89* [denying vote to state resident serviceman because he resided in another state at the time he joined the military], *the resulting apportionment base offends no constitutional*

> *bar, and compliance with the rule established in Reynolds v. Sims is to be measured thereby.*

Id. at 92 (emphasis added).

This Court thus has recognized the states' prerogative to include non-citizens in the population base from which districts are constructed so long as the Constitution is not offended. ("The decision to include . . . any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." *Burns supra*); *see also Sugarman, supra* at 642-43 (recognizing "the state's broad power to define its political community"). Accordingly, a state's inclusion of non-citizens in the population base for districting is not *per se* unconstitutional.

Indeed, the Constitution explicitly recognizes total population as a valid measure by which electoral districts may be constructed, thus embodying representational equality. Section 2 of the Fourteenth Amendment, governing Congressional apportionment, states: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." The Fourteenth Amendment does not exclude aliens, minors or women (who did not have suffrage at the time of the adoption of the Fourteenth Amendment). Whatever the reasons that informed the adoption of the Fourteenth Amendment to read as it does, the fact remains that the Constitution constructs federal electoral districts on a total population basis. It is illogical to claim that the Fourteenth Amendment forbids that which the Fourteenth Amendment explicitly requires.

IV. CVAP is Not a Panacea and Its Use Will Have a Retrogressive Impact on New York's Minority Community

The thesis that CVAP-based districting will result in one citizen's vote carrying the same weight as that of another citizen, irrespective of district of residence, is ill founded. CVAP is but a subset of total population. It is, in essence, total population minus aliens and minors. But CVAP is not a measure of the population that actually votes. Even using CVAP, the weight accorded a voter residing in an apathetic district, where few people register or vote, is far greater than that of a voter in a politically active district where voter participation is high.

Using CVAP will have a retrogressive effect on New York's minority population, and likely those of other states as well. At present, non-citizens are included in the number of persons needed to comprise a district, as calculated in accordance with *Reynolds v. Sims*, 377 U.S. 533 (1964). If non-citizens are eliminated from the districting base, the denominator, i.e. the number of districts (150 in the New York Assembly), will remain constant, but the numerator, i.e. the population base, will shrink, resulting in fewer persons per district. Since the Voting Rights Act requires that cohesive compact minority populations be aggregated into a single district, *see Thornburg v. Gingles*, 478 U.S. 30 (1986), without aliens to fill out district population, the net result will be fewer Voting Rights districts, a retrogressive outcome inconsistent with the Voting Rights Act.

A direct consequence of compelling the use of CVAP for New York redistricting would be a significant decline in the voting strength of Voting Rights Act protected minorities to the benefit of the white majority population. As the chart below illustrates, Asians comprise more

than 8% of New York's total population, but as a share of citizens of voting age they make up less than 6%. As measured against CVAP, Hispanic population drops by five percentage points, from nearly 18% of the population as a whole to less than 13% of CVAP. And the percentage of Black population is 14.25% of CVAP, but over 15% of total population. By contrast, the white population jumps from 58% of total population to 66% of CVAP.

New York State Total and Citizen Voting Age Population Data Source: 2009-2013 American Community Survey				
	Total Population		CVAP	
Total	19,487,055	100.00%	13,313,630	100.00%
Asian	1,586,550	8.14%	789,175	5.93%
Black	2,943,655	15.11%	1,897,160	14.25%
White	11,306,475	58.02%	8,794,915	66.06%
Other	162,290	0.83%	109,665	.82%
Hispanic	3,488,085	17.90%	1,722,720	12.94%

Any argument predicated on purportedly analogous Voting Rights Act Section 2 vote dilution authorities begs the question. Section 2 does not implicate the structural nature of our representative democracy. Nor does Section 2 purport to address whether the Constitution contemplates representational or electoral equality, the question that lies at the heart of the instant controversy. Instead, Section 2 is concerned only with the dilution of minority voting power. The statute thus presupposes that the relevant analytic measure is voter-to-voter. This scarcely controls the measure for purposes of the broader

question posed under the Equal Protection Clause. *Cf. Chen v. City of Houston*, 532 U.S. 1046 (2001) (Thomas, J., dissenting from denial of certiorari).

V. The Deviation Permitted in State Districting Should Be Measured by Reference to the Permissible Population Base Chosen by the State

Under principles enunciated in *Mahan v. Howell*, 404 U.S. 1201 (1971), and *Brown v. Thomson*, 462 U.S. 835 (1983), state districts are not held to a standard of absolute population equality. Rather, minor population variations among districts are permissible. Deviations under 10% are regarded as *de minimus*, requiring no justification by the state. *E.g., Connor v. Finch*, 431 U.S. 407 (1977).

Appellants' invocation of a CVAP deviation to challenge the plan at issue is analytically faulty. The challenged plan was constructed by reference to total population. So long as a constitutionally acceptable population base is employed, logic dictates that the 10% deviation analysis be predicated on the same base as that upon which the plan itself was constructed. In *Burns*, this Court has recognized a state's freedom to select total population as its districting base. Whether the deviations in the challenged plan exceed 10% therefore also must be measured by reference to the total population base upon which the plan was drawn. Appellants' CVAP-based challenge to total population based districts is an apples-to-oranges comparison. The absolutist view that CVAP is the only permissible base for districting is contrary to the jurisprudence of this Court.

CONCLUSION

Amicus respectfully submits that this Court should affirm the decision below.

Respectfully submitted,

C. DANIEL CHILL
Counsel of Record
ELAINE M. REICH
GRAUBARD MILLER
405 Lexington Avenue, 11th Floor
New York, New York 10174
(212) 818-8800
dchill@graubard.com
Counsel for Amicus Curiae

September 2015

APPENDIX

New York State Laws/Rules (Above and Beyond Federal Law) Providing Immigrants' NYS State Services/Rights (in addition to rights/benefits for undocumented)

Right	Description	Legal Status	Citation
Minority and Women-Owned Business Enterprise (MWBE) Certification	MWBE Certification/ Eligibility requirements	US citizen or permanent resident alien	State Law: Executive Law §310(8)- "minority group member" shall mean a US citizen or permanent resident alien who can demonstrate members in the one of the following groups: (a) Black persons having origins in any of the Black African racial groups; (b) Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban Central or South American of either Indian or Hispanic origin, regardless of race; (c) Native American or Alaskan native persons having origins in any of the original peoples of North America; (d) Asian and Pacific Islander persons having origins in any of the Far East countries, South East Asia, the Indian subcontinent or the Pacific Islands.

Alcohol and Beverage licenses	Eligibility for Alcohol and Beverage licenses	Aliens lawfully admitted to the US	State Law: Alcohol Beverage Control (ABC) Law §126(3) Forbids ABC licenses to any "person who is not a citizen of the United States or an alien lawfully admitted for permanent residence in the United States."
Newsstand Vendor licenses	Eligibility for Newsstand Vendor licenses	Aliens lawfully admitted to the US	State Law: General City Law §10 - Licensed blind vendor (newsstands) must be a "citizen of the United States or an alien lawfully admitted for permanent residence in the United States"

Funeral Director licenses	Eligibility for Funeral Director licenses	Aliens lawfully admitted to the US	State Law: Public Health Law §3421(2)(a) - A funeral director licensee must be "citizen of the United States or an alien lawfully admitted for permanent residence in the United States"
Teacher certification	Eligibility for Teacher certification	Various	State Law and Regulations: Education Law §3001(3): No person shall be a teacher who is "not a citizen. The provisions of this subdivision shall not apply, however, to an alien teacher now or hereafter employed, provided such teacher shall make due application to become a citizen and thereafter within the time prescribed by law shall become a citizen. The provisions of this subdivision shall not apply, after July first, 1967, to an alien teacher employed pursuant to regulations adopted by the commissioner of education permitting such employment. The citizenship requirements of this subdivision shall not apply to an alien teacher nor or hereafter employed who immigration

			status is that of a lawful permanent resident of the United States and who would otherwise be eligible to serve as a teacher, or to apply for or receive permanent certification as a teacher, but for the foregoing requirements of this subdivision." The rules appear at 8 New York Codes, Rules and Regulations (NYCRR) §80-1.3.
Teaching permits	Authorizes temporary teaching permits to noncitizens in certain instances	Alien teacher who has applied for citizenship	Education Law §3001-a - Authorizes temporary teaching permits to persons who have filed first preference petitions with Federal immigration officials but are unable to obtain lawful status due to over-subscription of a quota, upon filing of an oath to support the Federal and state constitutions.
Physician licenses	Physician licensing requirements	Holders of an H-1B Specialty Occupation visa, and O-1 visa (for Individuals with Extraordinary Ability	State Law: Education Law §6524(6) Physician license requirements include: "Citizenship or immigration status: be a US citizen or an alien lawfully admitted for permanent residence in the US;

		or Achievement), or an equivalent or successor visa thereto	provided, however, that the board of regents may grant a three year waiver for an alien physician to practice in an area which has been designated by the department as medically underserved, except that the board of regents may grant an additional extension not to exceed six years to an alien physician to enable him or her to secure citizenship or permanent resident status, provided such status is being actively pursued; and provided further that the board of regents may grant an additional three year waiver, and at its expiration, an extension for a period not exceed six additional years, for the holder of an H-1b visa, and O-1 visa, or an equivalent or successor visa thereto."
Veterinarian licenses	Veterinarian license requirements	Aliens lawfully admitted to the US with exceptions	State Law: Education Law §6704(6) Veterinarian license requirements include: citizenship or immigration status: be a US citizen or an alien lawfully admitted for permanent

		residence in the US; provided, however that the board of regents may grant a one-time three-year waiver for a veterinarian why otherwise meets the requirements of this article and who has accepted an offer to practice veterinary medicine in a county in the state which the department has certified as having a shortage of qualified applicants to fill existing vacancies in veterinary medicine, and provided further that the board of regents may grant an extension of such three-year waiver of not more than one year.
Pharmacist licenses	Pharmacist license requirements	State Law: Education Law §6805(6): Pharmacist license requirements include: "be a US citizen or an alien lawfully admitted for permanent residence in the US." For identical language see, e.g. Education Law §6955(6) midwife, Education Law §7206(6) - professional engineer. Education Law §7324(6) - landscape architect, etc.

Medicaid and safety net assistance eligibility	Makes immigrants eligible for Medicaid coverage and safety net assistance benefits	Immigrants who arrived in the US after 1996 and have Qualified Alien status or who are Permanent Residence Under Color of Law (PRUCOL)	Social Services Law §122(2)(b), (c), and (d) extend eligibility for (state-funded) Medicaid safety net assistance to immigrants who arrived in the US after 8.22.96 and have had Qualified Alien status for less than five years or who are PRUCOL (permanently residing under color or law). Safety net assistance eligibility for these statuses is also addressed in Soc. Serv. L. § 158(1)(g).
Higher Education Services Corporation awards and loans	Makes certain immigrants eligible for Higher Education Services Corporation (HESC) awards and loans	Refugees, and aliens lawfully admitted to the US	State Law: Education Law §§661(3) and 692(2)(b) authorize HESC to make awards and loans to: "(a) a citizen of the United States, or (b) an alien lawfully admitted for permanent residence in the United States, or (c) an individual of a class of refugees paroled by the attorney general of the United States under his or her parole authority pertaining to the admission of aliens to the United States." (§661 provides that the person "must be" a citizen, alien, etc., but the core wording is identical.)

Membership in NYS Conservation Corps	Requires members of NYS Conservation Corps be citizens or lawfully admitted aliens	Lawfully admitted aliens	State Law: Parks, Recreation and Historic Preservation Law §3.23(4)(i) - NYS Conservation Corps member "must be a citizen or lawful permanent resident or lawfully admitted alien."
Legal services program	Makes immigrants eligible for legal services program	Aliens lawfully admitted to the US	State Law: Public Health Law §22(1)(e)- includes "immigration" as one of the issues that the health-related legal services program will assist income-eligible New Yorkers with.
Right to be appointed to a civil service position	All aliens lawfully admitted to the US cannot be denied appointment to a civil service position	Aliens lawfully admitted to the US for permanent residence	State Law: Civil Service Law §53 - provides: "Alienage. Except as otherwise provided by law, no alien lawfully admitted for permanent residence in the United States shall be denied appointment to a position in the competitive class of civil service for reasons of alienage."

Human trafficking law enforcement	Requires state and local law enforcement agencies to cooperate and provide human trafficking victims with citizenship forms	Victims of human trafficking	State Law: Social Services Law §483-dd - requires state and local law enforcement agencies to cooperate with human trafficking victims by providing an endorsement on a US Citizenship and Immigration Service form that the individual was a victim of human trafficking.
Protects immigrants' documents	Makes it illegal - an element of the crime - to take away or destroy an immigrant's documents	All immigrants	State Law: Penal Law §§135.35 and 230.34 - include withholding or destroying an individual's immigration documents within the elements of the crimes of labor trafficking and sex trafficking.

NYS Rights for Undocumented Immigrants (Above and beyond Federal Law)

Right	Description	Legal Status	Citation
Child Health Plus	NYS health care program for uninsured children under 19 who are ineligible for Medicaid	Undocumented children	State Law: Public Health Law §2511 extends eligibility to all NYS residents - state resources must be used to cover services to undocumented children who do not meet the citizenship requirements of Title XXI of the Social Security Act
Medicaid	Medicaid for recipients of Medicaid as of 8/4/97, who were living in residential health care facilities or residential facilities licensed by state Office of Mental Health (OMH) or state Office of Mental	Undocumented persons living with AIDS (persons living with AIDS - PLWAs) and nursing home residents before 1997	State Law: Social Services Law §122(c) provides that undocumented persons are eligible for safety net assistance and for Medicaid, except that Medicaid is limited to (l) treatment of emergency medical conditions or (2) full Medicaid coverage for undocumented persons living with AIDS or those residing in residential health care facilities or OMH or OMRDD residential facilities, provided such persons were receiving Medicaid as of 8/4/97 based on a finding at that time that he/she was residing

	Retardation/ Developmental Disabilities (OMRDD)		under color of law. Social Services Law §364-i establishes presumptive eligibility without reference to immigration status, but expands Medicaid for treatment of breast, cervical, colon and prostate cancer and for pregnant women with state funds only - as a result NYS does not apply Federal exclusions of undocumented. Public Health Law §2530-a creates pre-natal care assistance program for all pregnant women eligible for Medicaid, including those eligible pursuant to Social Services Law §364-i.
Medicaid	Medicaid for people living with AIDS and living in residential health care facilities (recipients of Medicaid as of 8/4/97, who were also diagnosed with AIDS)		
Medicaid	Medicaid - Emergency Indigent Health Care	Undocumented	

Pre-natal Care Assistance Program/ Medicaid for Pregnant Women	Health coverage for pregnant women and limited treatment for cancer patients	Undocumented pregnant women and cancer patients	
Protective services, foster care and residential services	Right to protective services, foster care and residential services for domestic violence victims	Undocumented	State Law: Social Services Law §398-e provides that an alien, including a non-qualified alien under federal law, is eligible for protective services for adults and children, foster care services and residential services for victims of domestic violence.
Access to in-state tuition	Right to in-state tuition rates	Undocumented	State Law: Both State University of New York (SUNY) (Education Law §355(h)(8)) and City University of New York (CUNY) (Education Law §6206(7)(a-l)) provide that undocumented persons who attended and graduated from NYS high schools are eligible for in-state tuition. Education Law §6301(5)

			sets forth similar qualifications to be deemed a "resident" for purposes of community college attendance.
Access to K-12 education	Access to K-12 education without requiring social security number or disclosure of immigration status	Undocumented children	Based on Federal case law and Federal and NYS laws, the State Education Department (SED) requires that all children of school age, regardless of immigration status, are subject to compulsory education requirements. Education Law §305(9) provides that SED shall obtain a list of "alien children of school age" and provide this information to school boards for the purposes of compulsory education. SED has adopted rules at 8 New York Codes, Rules and Regulations (NYCRR) §100.2(y) that prescribe flexible enrollment and documentation requirements that, in SED's words, have "prohibited enrollment application policies which are unlawful and/or have had a disparate impact on unaccompanied minors and

			undocumented youth." These rules are currently in effect on an emergency basis and proposed for permanent adoption.
Women, Infants, and Children Program (WIC)	WIC for pregnant women, women who gave birth and are nursing, infant or young child, at risk of health problems because of lack of food, low-income	Undocumented	Federal and State Laws: Federal U.S. Department of Agriculture regulations for the Women, Infants & Children (WIC) nutrition program at 7 Code of Federal Regulations (CFR) §246.7(c)(3) allow states to limit participation to citizens and qualified aliens. NYS has not elected to do so in its state plan.

NYS Rights for Undocumented Immigrants (Above and beyond Federal Law)

Right	Description	Legal Status	Citation
Empire State Child Tax Credit (state)	A federal and state income tax credit for families with children who qualify.	Anyone who qualifies	Federal and State Laws
Domestic Worker Bill of Rights	Rights for Domestic Workers	Not explicitly undocumented immigrants	State Law: Chapter 481 of the Laws of 2010
School Meals	School Meals (Breakfast and Lunch)	Anyone who qualifies	Federal
Summer Meals	School Meals (Breakfast and Lunch)	Anyone who qualifies	Federal/NYC: [From NYC website. Unverified as being statewide right for undocumented immigrants.]

Commodity Supplemental Food Program (CSFP)	Food for low-income, pregnant women, young children and seniors. Immigration status does not matter, but cannot also be on WIC.	Anyone who qualifies	[From NYC website. Unverified as being statewide right for undocumented immigrants.]
Head Start	Free educational programs for eligible children fiom birth to age five, family support services.	Immigration status does not matter. Children from families receiving Cash Assistance or Supplemental Security Income (SSI) automatically qualify.	[From NYC website. Unverified as being statewide right for undocumented immigrants.]
Prekindergarten	Universal Prekindergarten	Anyone who qualifies	[From NYC website. Unverified as being statewide right for undocumented immigrants.]

Out-of-School Time (OST)	Free, educational and other programs for young people after school, on holidays, and in the summer. Immigration status does not matter.	Anyone who qualifies	[From NYC website. Unverified as being statewide right for undocumented immigrants.]
Healthy NY (working individuals)	Unless you are also a lawfully residing immigrant	Anyone who qualifies	[From NYC website. Unverified as being statewide right for undocumented immigrants.]
Family Planning Extension Program (FPEP)	Up to 26 months of family planning services for women who were on MA while pregnant but lost coverage after pregnancy.	Anyone who qualifies	[From NYC website. Unverified as being statewide right for undocumented immigrants.]

Nurse Family Partnership	Free program for women having first baby. Nurses visit throughout pregnancy and until baby is two, regardless of immigration status.	Anyone who qualifies	[From NYC website. Unverified as being statewide right for undocumented immigrants.]
Public Housing	As long as one (1) person in the household is a U.S. citizen or a qualified immigrant, the household can apply but the benefits are less.	Anyone who qualifies	[From NYC website. Unverified as being statewide right for undocumented immigrants.]

Section 8 Housing Assistance	As long as one (1) person in the household is a U.S. citizen or a qualified immigrant, the household can apply but the benefits are less.	Anyone who qualifies	[From NYC website. Unverified as being statewide right for undocumented immigrants.]
Right to hold title to property	Right to hold title to property	Alien	State Law: Real Property Law §15
Hospital Financial Assistance	Right to access hospital financial assistance	All	Administrative: [From NYC website. Unverified as being statewide right for undocumented immigrants.]
Drivers' Licenses	Access to Drivers' Licenses	DACA (Deferred Action for Childhood Arrivals) beneficiaries	Administrative

Supreme Court, U.S.
FILED
SEP 25 2015
OFFICE OF THE CLERK

No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, ET AL.,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

---

BRIEF FOR *AMICI CURIAE* THE HISPANIC NATIONAL BAR ASSOCIATION, THE NATIONAL BAR ASSOCIATION, AND THE SOUTH ASIAN BAR ASSOCIATION OF NORTH AMERICA IN SUPPORT OF APPELLEES

Robert T. Maldonado
President
Cynthia D. Mares
Immediate Past President
Hispanic National Bar Association
1020 19th Street, N.W.
Suite 505
Washington, D.C. 20036
(212) 278-0509

Peter Karanjia*
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C. 20006
(202) 973-4200
peterkaranjia@dwt.com

Counsel for *Amici Curiae*
*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE RIGHT TO PETITION BELONGS TO ALL CONSTITUENTS, REGARDLESS OF VOTER STATUS 4

II. FIRST AMENDMENT PRINCIPLES CONFIRM THE CONSTITUTIONALITY OF USING TOTAL POPULATION AS THE BASIS FOR LEGISLATIVE DISTRICTS 11

CONCLUSION 16

TABLE OF AUTHORITIES

Page(s)

Cases

Adderley v. State of Fla.,
385 U.S. 39 (1966).....5

BE & K Const. Co. v. N.L.R.B.,
536 U.S. 516 (2002).....10

Borough of Duryea, Pa. v. Guarnieri,
131 S. Ct. 2488 (2011).....*passim*

Buckley v. Valeo,
424 U.S. 1 (1976).....14

Calderon v. City of L.A.,
4 Cal. 3d 251 (1971).....12, 13, 14

District of Columbia v. Heller,
554 U.S. 570 (2008).....5

E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.,
365 U.S. 127 (1961).....10, 11, 12

Garza v. City of L.A.,
918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).....4, 11, 12, 13

Gregory v. City of Chi.,
394 U.S. 111 (1969).....3

Kirkpatrick v. Preisler,
394 U.S. 526 (1969).....4, 15

Marbury v. Madison,
1 Cranch 137, 5 U.S. 137, 2 L.Ed. 60
(1803).....11

Minnesota State Bd. for Cmty. Colls. v. Knight,
465 U.S. 271 (1984).....10, 14, 15

Nyquist v. Mauclet,
432 U.S. 1 (1977).....13

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 10, 14

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980).....9

Thomas v. Collins,
323 U.S. 516 (1945).....9

Tinker v. Des Moines Cmty. Sch. Dist.,
393 U.S. 503 (1969).....13

United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n,
389 U.S. 217 (1967)..... .....9, 10, 11, 14

Wright v. United States,
302 U.S. 583 (1938).....11

Constitutional Provisions

U.S. CONST. amend. I .....*passim*

U.S. CONST. amend. XIV ..... *passim*

Other Authorities

Akhil Reed Amar, *The Bill of Rights· Creation and Reconstruction* (Yale Univ. Press 2000) 7, 8, 15

Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (Louisiana State University Press 1969) 15

1 William Blackstone Commentaries on the Laws of England (St. George Tucker ed., Philadelphia, Birch & Small 1803) 10

DECLARATION OF INDEPENDENCE (U.S. 1776) 5

William Hamersley, *Connecticut—The Origins of Her Courts and Laws*, (*The New England States* Vol. 1 (William Thomas Davis ed. 1897)) 8

Stephen A. Higginson, *A Short History of the Right To Petition Government for the Redress of Grievances*, 96 Yale L.J. 142 (1986-1987) 7, 8, 14, 15

Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153 (1998) 6, 7, 8

Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. Rev. 667 (2003) 6

INTEREST OF *AMICI CURIAE*

The membership of *amicus curiae* the Hispanic National Bar Association ("HNBA") comprises thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance to the 53 million people of Hispanic heritage living in the United States. HNBA regularly petitions Congress and the Executive on behalf of all members of the communities it represents, including immigrants and children.

The National Bar Association ("NBA") is the Nation's oldest and largest national association of predominantly African-American lawyers, judges, educators, and law students. It has 84 affiliate chapters throughout the United States, Canada, the United Kingdom, Africa, and the Caribbean. The NBA also represents a professional network of more than 65,000 lawyers, judges, educators, and law students. Since its founding in 1924, the NBA has been deeply committed to advancing the civil rights of African-Americans, including their rights to fully participate in the democratic process of government.

---

[1] All parties to this litigation have consented to this *amici curiae* brief, and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

The South Asian Bar Association of North America ("SABA North America") is a voluntary bar organization that serves as an umbrella organization to 26 chapters in the United States and Canada representing over 6,000 lawyers, judges and law students. SABA North America is a recognized forum for the professional growth and advancement for South Asian lawyers in North America and seeks to safeguard the civil rights and liberties of the South Asian community across the continent. Members of SABA North America regularly interact with government officials on issues affecting the South Asian community, and both SABA North America and its chapters have filed *amicus curiae* briefs in this Court.

Amici support affirmance of the decision below on the ground that the Texas plan under review meets the constitutional requirements of equal protection by using a total population basis for districting. Rather than repeating the arguments of Appellees and other *amici* addressing Texas' plan under the Equal Protection Clause of the Constitution, however, this brief highlights the important First Amendment principles at stake in this case, which reinforce the constitutionality of the Texas districting plan.

SUMMARY OF ARGUMENT

The right to petition the government, enshrined in the First Amendment, is a bedrock American value. Unlike the right to vote, it has historically been open to all—not just citizens and voters, but

women, children, immigrants, Native Americans, slaves, and individuals with felony convictions.

While the early American form of petitioning is no longer common in modern government, it remains a core principle of American representative democracy that even those who cannot exercise the right to vote—whether it be due to age, immigration status, or a felony conviction—are constituents of their representatives and have a right to political expression and access. The right to petition is vitally important to groups that historically have been excluded from the political process, including the Latino and African-American communities and other minority groups. Members of *amici* regularly petition legislative bodies on major issues of the day, including immigration and criminal justice.

Appellants urge this Court to hold that a state legislative districting plan must be based upon voter population, rather than total population. But such a plan would result in districts with unequal constituencies, leaving residents of more heavily populated districts with less meaningful access to their representatives. That outcome cannot be squared with the First Amendment right of *all* individuals, whether voters or not, to petition their representatives in government. "[U]nder our democratic system of government," *Gregory v. City of Chicago*, 394 U.S. 111, 120 (1969) (Black, J., concurring), a right to petition nominally enjoyed by all—but without any commitment to representative government—would be nothing more than an empty promise.

As a result, "[i]nterference with individuals' free access to elected representatives impermissibly burdens their right to petition the government." *Garza v. City of L.A.*, 918 F.2d 763, 775 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). These First Amendment principles buttress the constitutionality of Texas' efforts to ensure evenly balanced districts based on total population. It would indeed be odd for the Equal Protection Clause to compel a result that is inconsistent with the fundamental purposes of the First Amendment right to petition. By creating districts populated by an equivalent number of constituents, the State of Texas maintains these avenues for political speech and the airing of grievances to one's representative in government, without regard to their voting status. Guarding against the "diminution of access to elected representatives," *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969), the Texas plan rests on a bedrock of sound First Amendment principles.

ARGUMENT

I. THE RIGHT TO PETITION BELONGS TO ALL CONSTITUENTS, REGARDLESS OF VOTER STATUS

The right of all individuals to petition the government has been a core value in this country since the colonial era, forming the heart of the Declaration of Independence and the capstone of the First Amendment. The text of the First Amendment guarantees "the right of the people . . . to petition the government for a redress of grievances." "The reference to 'the right of the people' indicates that

the Petition Clause was intended to codify a pre-existing individual right, which means that we must look to historical practice to determine its scope." *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2503 (2011) (Scalia, J., concurring in the judgment in part and dissenting in part) (citing *District of Columbia v. Heller*, 554 U.S. 570, 579 (2008)).

The historical antecedents of this right "run deep, and strike to the heart of the democratic philosophy." *Adderley v. State of Fla.*, 385 U.S. 39, 51 n.2 (1966) (Douglas, J., dissenting). When the Founders declared independence from the British crown, it was a lack of political access that motivated their manifesto. After cataloging the grievances of the colonists, the Founders declared:

> In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

The Declaration of Independence, para. 30 (U.S. 1776).

Since its inception, the right to petition has been broadly construed and available to all, without reference to citizenship or enfranchisement. In this way, "[p]etitions allowed participation in democratic governance even by groups excluded from the franchise." *Guarnieri*, 131 S. Ct. at 2499-500. These broad contours are reflected in the Massachusetts

Body of Liberties, adopted in 1641, which provides that "[e]very man whether Inhabitant or fforeiner, free or not free shall have libertie to come to any publique Court, Councell or Towne meeting, and either by speech or writing to move any lawfull, seasonable, and materiall question or to present any necessary motion, complaint, petition, Bill or information." Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 Fordham L. Rev. 2153, 2177 (1998). In keeping with this expansive understanding, petitions were accepted from women, Native Americans, free blacks, and slaves, as well as from white men who did not have the right to vote, such as prisoners and those who did not own property. Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. Rev. 667, 688 (2003).

Records of non-citizen immigrants petitioning local authorities date back to at least 1621, when a "Dutchmen's son" petitioned the Virginia Assembly for permission to return to the Netherlands. *Id.* at 689-90. When Acadian refugees were deported from Nova Scotia to the American colonies, they petitioned local colonial authorities for permission to travel, to be reunited with family members, and even to determine their citizenship status. *Id.* Individual immigrants petitioned for naturalization, and the passage of the Naturalization Act in 1798 unleashed a "flood" of petitions from immigrants seeking relief from the law's provisions. *Id.* at 710-11.

Historical records also show petitions from women—nearly two hundred years before they received the right to vote—on a variety of matters,

including business licenses, pensions and financial assistance for widows, and in at least one instance, inappropriate behavior by a local minister. Mark, *supra*, at 2184. "[P]etitions by women seeking the vote" thus played an important "role in the early woman's suffrage movement." *Guarnieri*, 131 S. Ct. at 2500. Similarly, Native Americans petitioned local authorities regarding tribal lands, and slaves petitioned for emancipation. Mark, *supra*, at 2185-86. Indeed, the right to petition played a "central role . . . in abolitionist thought and practice in the antebellum era." Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 32 (Yale Univ. Press 2000) (citation omitted); *see also Guarnieri*, 131 S. Ct. at 2499 (noting significance of petitions to the National Legislature "in the legislative debate on the subject of slavery in the years before the Civil War.").

For these unrepresented groups, "[t]he right to petition vested [them] with a minimum form of citizenship: petitioning meant that no group in colonial society was entirely without political power." Stephen A. Higginson, *A Short History of the Right To Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 153 (1986-1987). "Like the other provisions of the First Amendment, the clause [was] not primarily concerned with the problem of overweening majoritarianism; it [was] at least equally concerned with the danger of attenuated representation." Amar, *supra*, at 31 (citation omitted). Indeed, the text of the Petition Clause—"the right of *the people*"—"decisively signals its connection to popular-sovereignty theory." *Id.* at 30. The right to petition thus "ensured that topics of

concern to the unrepresented were raised in a body that purported to represent *all* the people, even a body lacking representatives of all segments of the population." Mark, *supra*, at 2194 (emphasis added).

Looking at legislative districting cases (such as this case) through the lens of the Petition Clause is particularly fitting because the paradigmatic exercise of the right to petition during the colonial era involved petitioning legislative bodies. "Petitions to the colonial legislatures concerned topics as diverse as debt actions, estate distributions, divorce proceedings, and requests for modification of a criminal sentence." *Guarnieri*, 131 S. Ct. at 2498 (citing Higginson, *supra*, at 146). Indeed, by 1781, "seven state constitutions protected citizens' right to apply or petition for redress of grievances," and "all seven referred . . to *legislative* petitions." *Id.* at 2503 (Scalia, J., concurring in the judgment in part and dissenting in part) (emphasis added). Moreover, petitions frequently spurred legislative action. In 1770, for example, Connecticut's Assembly acted on over 150 individual petitions, while enacting only 15 laws on its own initiative. Higginson, *supra*, at 146 (citing William Hamersley, *Connecticut—The Origins of Her Courts and Laws*, in *The New England States* Vol. 1, 472-98 (William Thomas Davis ed. 1897)). And, "[i]n eighteenth-century Virginia, . . more than half of the statutes ultimately enacted by the legislature originated in the form of popular petitions." Amar, *supra*, at 31 (citation omitted). As explained below (note 2, *infra*), the right to petition also contemplated a responsive and accountable legislative body (including the right to some form of fair hearing); it was not an empty

right to be ignored. *But see* Br. for Appellants at 40; Br. for Appellees at 47.

While the colonial form of petition is no longer a central feature of modern American government, its tradition continues in the robust protections for petitioning directed at government representatives. Even those without the political power of the vote have the right to call, write, email, or visit their representative to voice their concerns and share their opinions on particular issues. In this way, the right to petition—like its "cognate rights," *Thomas v. Collins*, 323 U.S. 516, 530 (1945), under the other clauses of the First Amendment—"embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586-87 (1980) (Brennan, J., concurring in the judgment); *see also United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) ("the rights to assemble peaceably and to petition for a redress of grievances are intimately connected both in origin and in purpose, with the other First Amendment rights of free speech and free press," so that "'[a]ll these [rights], though not identical, are inseparable.'") (quoting *Collins*, 323 U.S. at 530); *Guarnieri*, 131 S. Ct. at 2494 (noting that "the rights of speech and petition share substantial common ground"). It is therefore not surprising that this Court has described the right to petition as "one of the most precious of the liberties safeguarded by the Bill of Rights . . . and . . implied by '[t]he very idea of a government, republican in

form.'" *BE & K Const. Co. v. N.L.R.B.*, 536 U.S. 516, 524-25 (2002) (quoting *Mine Workers*, 389 U.S. at 222).

For this right to be "something more than an exercise in futility," individuals must have a "*meaningful* opportunity" to communicate with their government and express their views. *Minnesota State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 308-09 (1984) (Stevens, J., dissenting). "In a representative democracy such as this," legislative bodies "act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961). Indeed, "'a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents.'" *New York Times Co. v. Sullivan*, 376 U.S. 254, 297 (1964) (Black, J., concurring) (quoting 1 William Blackstone Commentaries on the Laws of England, editor's app. (St. George Tucker ed., Philadelphia, Birch & Small 1803)).

The rule urged by Appellants would devastate this right to meaningful access. Districting based solely on voter population would dilute the access of nonvoter constituents, undermining their exercise of this fundamental right. That this is accomplished by indirect means—rather than, say, a law that nakedly prohibits the right to petition—is no less an assault upon the Bill of Rights. "The First Amendment would . . . be a hollow promise if it left

government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such." *Mine Workers*, 389 U.S. at 222.

II. FIRST AMENDMENT PRINCIPLES CONFIRM THE CONSTITUTIONALITY OF USING TOTAL POPULATION AS THE BASIS FOR LEGISLATIVE DISTRICTS

The principles undergirding the First Amendment right to petition fully support the constitutionality of Texas' efforts to ensure that legislative districts contain equivalent populations of constituents. It would indeed be odd—and contrary to fundamental canons of constitutional construction—for the Equal Protection Clause to compel states to ignore these First Amendment principles and create districts with unequal channels for political speech and access. "The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute . an intent to invade these freedoms." *Noerr Motor Freight*, 365 U.S. at 138; *see also Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 174, 2 L. Ed. 60 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect"); *Wright v. United States*, 302 U.S. 583, 588 (1938) (it is the "first principle of constitutional interpretation" that "every word must have its due force, and appropriate meaning") (citation omitted).

The Ninth Circuit highlighted the interplay between the Petition Clause and the Equal Protection Clause in *Garza v. County of Los Angeles*,

where it held that a districting plan based on *voting* population rather than *total* population "would dilute the access of voting age citizens in that district to their representative, and would similarly abridge the right of aliens and minors to petition that representative." 918 F.2d 763, 775 (9th Cir. 1990). Recognizing that equal representation intertwines with the First Amendment right to petition, the court explained:

> Interference with individuals' free access to elected representatives impermissibly burdens their right to petition the government. . . . Since 'the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives', this right to petition is an important corollary to the right to be represented.

Id. at 775 (citing *Noerr Motor Freight*, 365 U.S. at 137). As the California Supreme Court has recognized, "[c]rucial though voting is as a method of participation in representative government, access to elected officials is also an important means of democratic expression—and one that is not limited to those who cast ballots." *Calderon v. City of L.A.*, 4 Cal. 3d 251, 259 (1971) (citations omitted).

Consistent with the Petition Clause, a plan based upon total population allows all individuals to exercise their petition rights through local representatives, regardless of voter status. Minors and non-citizens, for example, may not have the right to vote, but they have a right to political

expression and to petition their representatives. *See Nyquist v. Mauclet*, 432 U.S. 1 (1977); *Tinker v. Des Moines Cmty. Sch. Dist.*, 393 U.S. 503, 511-13 (1969). As taxpayers, students, neighbors and workers, they have a stake in their local communities. They attend local schools, work in local businesses, and seek medical care from local hospitals. "As such, they have a right to petition their government for services and to influence how their tax dollars are spent." *Garza*, 918 F.2d at 775.

While voters may exercise their political speech at the ballot box, the right to petition is available at any point in the political process, and on any topic of importance to the speaker. A plan that deliberately constricts this access, making it harder for certain voices to be heard—invariably, the voices of those already disadvantaged in the political process—would impermissibly burden this core First Amendment right. As the California Supreme Court noted in *Calderon*, "[a]dherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government." 4 Cal. 3d at 258-59. The court explained:

> [A] 17-year-old, who by state law is prohibited from voting, may still have strong views on the Vietnam War which he wishes to communicate to the elected representative from his area.
>
> Furthermore, much of a legislator's time is devoted providing services and information to

> his constituents, both voters and nonvoters. A district which, although large in population, has a low percentage of registered voters would, under a voter-based apportionment, have fewer representatives to provide such assistance and to listen to concerned citizens.

Id. Such diminished access is at odds with the First Amendment, "which was designed 'to secure the widest possible dissemination of information from diverse and antagonistic sources,' and 'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (quoting *Sullivan*, 376 U.S. at 266, 269); *see also Mine Workers*, 389 U.S. at 222 (noting "inseparable" nature of inter-related First Amendment rights) (citation omitted). "'It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances.' Both speech and petition are integral to the democratic process." *Guarnieri*, 131 S. Ct. at 2495 (citation omitted).

While the First Amendment may not require legislators to *listen or respond* to petitioning speech under this Court's precedents, *Minnesota State Bd. for Cmty. Colls.*, 465 U.S. at 285,[2] it does require an

---

[2] Commentators have persuasively argued that, based on its original meaning, the right to petition entailed a broader right to a response from the government. *See, e.g.*, Higginson, *supra*, at 155 ("That the Framers meant to imply a corresponding governmental duty of a fair hearing seems clear given the

audience, thereby protecting the channels of communication between the people and their representative government. *See* Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* at 40 (Louisiana State University Press 1969) ("the petitioning of a legislative body would seem to be an inherent part of its relation with its constituency"). By creating districts populated by an equivalent number of constituents, the State of Texas maintains these avenues for political speech and the airing of grievances to one's representative in government, without regard to whether one did not (or could not) vote for that representative. Guarding against "diminution of access to elected representatives," *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969), the Texas plan rests on a bedrock of sound First Amendment principles.

---

history of petitioning in the colonies and the colonists' outrage at England's refusal to listen to their grievances") (citations omitted); Amar, *supra*, at 31 ("the clause was originally understood as giving extraordinary power to even a single individual, for the right to petition implied a corresponding congressional duty to respond, at least with some kind of hearing") (citing Higginson, *supra*, at 155-58).

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the Western District of Texas.

Respectfully submitted,

Robert T. Maldonado
President
Cynthia D. Mares
Immediate Past President
Hispanic National Bar Association
1020 19th Street, N.W., Suite 505
Washington, D.C. 20036
Tel: (212) 278-0509
Fax: (202) 503-3403

Peter Karanjia*
Alison Schary
Davis Wright Tremaine LLP
1919 Pennsylvania Ave., NW
Suite 800
Washington, D.C. 20006
Tel: (202) 973-4200
peterkaranjia@dwt.com
Counsel for *Amici Curiae*
*Counsel of Record

Benjamin Crump
President
National Bar Association
1225 11th Street, NW
Washington, D.C. 20001
Tel: (202) 842-3900
Fax: (202) 289-6170

Anuradha Gwal
President
South Asian Bar Association of North America
423 Cadberry Ct.
Pittsburgh, PA 15241
Tel: (779) 316-9018

SEPTEMBER 2015

Supreme Court, U
FILED
AUG - 7 20
OFFICE OF THE C

No. 14-940

In The
Supreme Court of the United States

SUE EVENWEL and EDWARD PFENNINGER,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF APPELLANTS

DALE L. WILCOX
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
litigation@irli.org
(Member of the Supreme Court Bar;
DC Bar pending; under direct
supervision of DC Bar member)

Attorney for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of *Amicus Curiae*	1
Summary of Argument	2
Argument	4
A. Equality Among Electors Requires the Invalidation of the Current Texas Districting Plan	4
B. Illegal Aliens Have No Right to Apportionment or Representation under the Constitution or the Fourteenth Amendment	8
C. The Ninth Circuit's "Access Theory" upon which the District Court Relied is Misplaced and Anachronistic	10
D. Apportionment by Total Population Induces Abuse	18
E. Continued Debasement of Citizens' Voting Power Due to Abuse of the Apportionment Process Demands a Swift Response from this Court	20
Conclusion	24

TABLE OF AUTHORITIES

Page

CASES

Avery v. Midland County, 390 U.S. 474 (1968) 17

Baker v. Carr, 369 U.S. 186 (1962) 21

Barnett v. City of Chicago, 141 F.3d 699 (7th Cir. 1998) 6

Burns v. Richardson, 384 U.S. 73 (1966).....*passim*

Chen v. City of Houston, 532 U.S. 1046 (2001).....12, 21

Connor v. Finch, 431 U.S. 407 (1977) 20

Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996).....21

Dunn v. Blumstein, 405 U.S. 330 (1972).....4

Evenwel v. Perry, No. 1:14-CV-335 (W.D. Tex.).....6, 20

Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990) 6, 10

Gray v. Sanders, 372 U.S. 368 (1963).....5

JEFM v. Holder, No. C14-1026 (W.D. Wash.).....22

Mathews v. Diaz, 426 U.S. 67 (1976) 8

Reynolds v. Sims, 377 U.S. 533 (1964) .....*passim*

Texas v. United States, No. 1:14-CV-254 (S.D. Tex.) 22, 23

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. XIV .....*passim*

8 U.S.C. § 1302 9

TABLE OF AUTHORITIES – Continued

Page

OTHER MATERIALS

Audrey Singer, *Immigrants in 2010 Metropolitan America: A Decade of Change*, BROOKINGS INST. (Oct. 24, 2011), *available at* http://www.brookings.edu/research/speeches/2011/10/24-immigration-singer 14

Audrey Singer & Jill H. Wilson, *Immigrants in 2010 Metropolitan America: A Decade of Change*, BROOKINGS INST. (Oct. 13, 2011), *available at* http://www.brookings.edu/research/papers/2011/10/13-immigration-wilson-singer 13

Charles Wood, *Losing Control of America's Future*, 22 HARV. J.L. & PUB. POL'Y 465 (Spring 1999).....8, 15

CONG. GLOBE, 39th Cong., 1st Sess. 2400 (1866).....9

Counting the Vote: Should only U.S. Citizens be included in Apportioning our Elected Representatives?: Hearing before House Subcommittee on Federalism and the Census, 109th CONGRESS 88 (2005) (statement of James G. Gimpel, Professor of Government, University of Maryland, College Park), http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg26074/html/CHRG-109hhrg26074.htm (last visited Aug. 04, 2015).....15, 16

David Nakamura, *Influx of Minors across Texas Border Driven by Belief They will be Allowed to Stay in U.S.*, WASH. POST (Jun. 13, 2014).....22

TABLE OF AUTHORITIES – Continued

Page

David Rogers, *Flood of child migrants a neglected challenge*, POLITICO (May 28, 2014), *available at* http://www.politico.com/story/2014/05/flood-of-child-migrants-a-neglected-challenge-107198.html.....23

Elizabeth M. Grieco, *et al., The Size, Place of Birth, and Geographic Distribution: 1960 to 2010*, U.S. CENSUS BUREAU (Oct. 2012), *available at* https://www.census.gov/population/foreign/files/WorkingPaper96.pdf.....13

International Migration 2013, UNITED NATIONS (2013), *available at* http://www.un.org/en/development/desa/population/migration/publications/wallchart/docs/wallchart2013.pdf.....13

Jennifer Scholtes, *CBP Chief: Policies may be Fuelling Spike in Minors Crossing Border Illegally*, CQ ROLL CALL (Apr. 2, 2014).....22

Jon Feere, *The Myth of the "Otherwise Law-Abiding" Illegal Alien*, CENTER FOR IMM. STUDIES (Oct. 2013), *available at* http://cis.org/myth-law-abiding-illegal-alien.....9

Krabill & Fielding, No More Weighting: One Person, One Vote Means One Person, One Vote, 16 TEX. L. & POL. 275 (Spring 2012).....11

Kristin D. Burnett, *Congressional Apportionment*, U.S. CENSUS BUREAU (Nov. 2011), *available at* https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf 15

TABLE OF AUTHORITIES – Continued

Page

Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens, Apportionment, the Doctrine of Allegiance, and the Law*, 25 BYU J. PUB. L. 35 (2010).....7, 9, 19

Race Summary Report – 2012 General Election, OFFICE OF THE SECRETARY OF STATE (Nov. 2012), http://elections.sos.state.tx.us/elchist164_state.htm (last visited Aug. 04, 2015).....17

Roger Waldinger, *From Ellis Island to LAX: Immigrant Prospects in the American City*, 30 INT. MIGR. REV. 1078 (Winter 1996) 16

Rotten Borough Definition, ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/topic/rotten-borough (last visited Aug. 04, 2015).....14

San Francisco Shooter States He Chose City for Sanctuary Policies, ABC 7 KGO (Jul. 06, 2015), *available at* https://www.youtube.com/watch?v=K2WoQ8Pcttk#t=117 19

Senate Districts, *Texas Political Almanac*, http://www.txpoliticalalmanac.com/index.php?title=Main_Page (last visited Aug. 04, 2015) 16

State and County QuickFacts, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/48000.html (last visited Aug. 04, 2015).....11

TABLE OF AUTHORITIES – Continued

Page

Unauthorized Immigrant Profiles – State and County Estimates, MIG. POL'Y INST., http://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles (last visited Aug. 04, 2015) 19

William A. Kandel, *et al.*, *Unaccompanied Alien Children: Potential Factors Contributing to Recent Immigration*, CONG. RES. SERV. (Jul. 03, 2014), *available at* http://fas.org/sgp/crs/homesec/R43628.pdf 22

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae, Immigration Reform Law Institute (IRLI), is a non-profit legal education and advocacy law firm working to defend the rights of individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful, to monitor and hold accountable federal, state, or local government officials who undermine, fail to respect, or comply with our national immigration and citizenship laws, and to provide expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

While *Amicus* agrees with all points raised by the Appellants, this *amicus curiae* brief is focused on the district court's rigid application of total population as an apportionment metric in general and specifically its failure to appreciate the debasement of citizen-voting power due to total population apportionment in high immigration states such as Texas.

---

[1] Both parties have filed blanket consents to *amicus curiae* briefs as noted on the docket in this case. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from IRLI has made a monetary contribution to the preparation or submission of this brief. IRLI does not have a parent corporation, and no publicly held company owns ten percent or more of IRLI's stock.

SUMMARY OF ARGUMENT

The State of Texas's current policy of counting aliens, legal and illegal, for apportionment is abridging the democratic rights of its citizens. Due to Plan 172's failure to consider the citizen-voter population of the state, the senate districts Appellants reside in and elsewhere have become substantially malapportioned. Two related and perverse effects have resulted from such a policy: (1) Citizen-voters in districts with many aliens are given outsized voting power, and (2) more representation is being allocated to areas where alien populations are large. By using total population as a metric, Plan 172 dilutes the representation of citizens in districts with fewer numbers of aliens. The resulting variation in the number of citizens in Texas's senate districts therefore violates the principles of equality of representation embodied in the Constitution and decisions from this Court.

Because these variations are increasing, the situation demands this Court's urgent attention. Texas has one of the highest immigrant populations and one of the fastest immigration growth rates in the country. Massive immigration inflows into the State and elsewhere over the past four decades make the first generation of apportionment cases, decided when total and voter populations "tracked" each other, increasingly outmoded and anachronistic.

Although the framers of both the Constitution and the Fourteenth Amendment understood that

alienage should not prevent a person from being counted in a census, decades of mass immigration and the resulting distortive effect on citizen representation is beginning to diminish the very democratic rights our founders sought to create. Any equal-protection based "right" of apportionment for *legal* aliens cannot be justified when it comes at the expense of actual citizens. Indeed, no persuasive policy justification has been offered for violating electoral equality and debasing the citizens' right to vote. As for *illegal* aliens, historical evidence shows granting them representation and apportionment "rights" was never contemplated by drafters of the Census Clause and the Apportionment Amendment.

By basing apportionment simply on aggregate bodies, Texas legislators are able to manipulate the "weighting" of voting populations by increasing their numbers in districts with fewer aliens. This Court has already found this general practice to be unconstitutional. *See Reynolds v. Sims*, 377 U.S. 533, 563 (1964). ("Weighting the votes of citizens differently, by any methods or means, merely because of where they happen to reside, hardly seems justifiable."). This abuse of the apportionment system is witnessed in other parts of the country where state and local governments use so-called "sanctuary" policies to encourage illegal aliens to migrate to their communities, thereby ramping up their respective state's representative base. On top of legislative votes at the state level, apportionment by total population disrupts legislative votes at the national level, including

Electoral College votes for President. One way for Texas to end the abuse under its current system is to harmonize its voting population with its total population by excluding legal and illegal aliens from its apportionment base.

This Court must act in order to return to the citizens of Texas their rightful share of political power and close the gross disparities between electors in the state's senate districts.

ARGUMENT

A. Equality Among Electors Requires the Invalidation of the Current Texas Districting Plan.

In *Burns v. Richardson*, this Court acknowledged that, barring a metric where a discriminatory choice to include or exclude persons could arise, equality among electors is paramount. 384 U.S. 73, 92 (1966). Equality and vote dilution cannot coexist. In *Reynolds*, this Court defined "vote dilution" as occurring when "[a]n individual's right to vote for state legislators is unconstitutionally impaired [because] its weight is in a substantial fashion diluted [ ] compared with votes of citizens living in other parts of the State." 377 U.S. at 567; *see also Dunn v. Blumstein*, 405 U.S. 330, 336 (1972) ("[A citizen] has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."), and *Reynolds*, 377 U.S. at 567 ("To the extent

that a citizen's right to vote is debased, he is that much less a citizen."). This principle arises from the "one person, one vote" principle embodied in our founding documents, Constitution, and documents of national historical significance as identified by the Court in *Gray v. Sanders*, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote.").

In *Burns*, the state of Hawaii redrew its districts by including only registered voters in its apportionment base so as to exclude both "military personnel" and "transients," groups whose numbers had grown considerably in the years previous. This Court upheld that plan against an equal protection challenge. In so doing, the Court noted that the increased concentration of the excluded groups in a particular county would have made apportionment by population "grossly absurd and disastrous." *Id.* at 94. According to the court, "[t]otal population figures may [ ] constitute a substantially distorted reflection of the distribution of state citizenry." *Id.* The court held that "with a view to its interim use, Hawaii's registered voter base does not on this record fall short of constitutional standards." *Id.* at 97.

In Texas with its outsized legal and illegal alien populations, blind adherence to apportionment by general population is creating a "distorted reflection" of the state's elector distribution and "grossly absurd"

senate districts. As the record reveals, under the current districting plan in Texas "the vote of an elector residing in a district where the number of electors is relatively high, like the districts in which Appellants reside, is given significantly less weight than the votes of those in districts where the number of electors is relatively low." Complaint at 2, *Evenwel v. Perry*, No. 1:14-CV-335 (W.D. Tex. Apr. 21, 2014); Appellants' Jurisdictional Statement at 9, 10 (Tables 2 and 3). In other words, the current plan dilutes Appellants' vote in a substantial fashion. As a result, the plan cannot stand.

Furthermore, electoral equality supersedes any real or imagined privileges of political representation possessed by legal and illegal aliens. As Judge Kozinski rightly stated in his concurring and dissenting opinion in *Garza v. County of Los Angeles*, "at the core of one person one vote is the principle of electoral equality, not that of equality of representation." 918 F.2d 763, 782 (9th Cir. 1990). An alien's "right" to political representation must give way to the *paramount* concern of equality among electors as "[t]he right to vote is one of the badges of citizenship. The dignity and very concept of citizenship are diluted if noncitizens are allowed to vote either directly *or by the conferral of additional voting power on citizens believed to have a community of interest with the noncitizens*." *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998) (emphasis added). When apportionment "rights" dilute the vote of the citizenry, the former must give way to the latter.

During the debates of the Reconstruction Congress over the Fourteenth Amendment's Apportionment Clause, Senators expressed concerns about the distortive effects of an apportionment system based on total population. Senator John Sherman of Ohio, for instance, could not understand why a state that has "a very large element of unnaturalized foreigners" should be given political power at the expense of other states. Patrick J. Charles, *Representation Without Documentation?: Unlawfully Present Aliens, Apportionment, the Doctrine of Allegiance, and the Law*, 25 BYU J. PUB. L. 35, 59 (2010). For Sherman, the correct proposition was the one that "puts a citizen in one State on a footing of precise equality with a citizen in every other State." *Id.*[2] And this Court has so held that to be the standard.

The undeniable perversion of democracy at issue here has been compounded by Texas as the challenged apportionment has diluted the vote of the citizenry in favor of those not authorized to reside in the United States in the first instance. Whether the illegal alien has just been "transported into the United States by a smuggler, has received a deportation notice, or is simply an illegal resident who has not been apprehended because of ineffective federal

---

[2] In contrast, Representative Roscoe Conkling from the big-immigration state of New York, lobbied to include unnaturalized foreigners because, as he said, the estimated "unnaturalized foreigners" in his state contributed "three Representatives and a fraction of a fourth." *Id.* at 52, 53, n.105.

law enforcement," Texas apportions them along with citizens and legal aliens. Charles Wood, *Losing Control of America's Future*, 22 HARV. J.L. & PUB. POL'Y 465, 470 (Spring 1999). The Constitution cannot be interpreted to sustain such a practice. Indeed, the granting of such rights does not comport with the general approach of this Court as outlined in *Mathews v. Diaz*, distinguishing between citizens and guests or interlopers:

> Neither the overnight visitor, the unfriendly agent of a hostile foreign power, the resident diplomat, *nor the illegal entrant*, can advance even a colorable constitutional claim to a share in the bounty that a conscientious sovereign makes available to its citizens and some of its guests.

426 U.S. 67, 80 (1976) (emphasis added).

B. Illegal Aliens Have No Right to Apportionment or Representation under the Constitution or the Fourteenth Amendment.

The doctrine of allegiance embodied in Congress's plenary power over naturalization rests on the condition that an alien must submit to the nation's laws and declare his or her intention to lawfully settle in order to be subject to those laws. Without such submission he or she is still subject to the laws of their foreign jurisdiction: "[W]hen [illegal] aliens only partially submit to the laws of their host nation they violate the first rule of the law of nations concerning emigration – the doctrine of allegiance and submission

of the government." Charles, *supra* at 63. The drafters understood that political privileges, such as apportionment and representation, were "subject to allegiance and subjecting one's self fully to the laws." *Id.*

During the Reconstruction debates, then-Senator Andrew Johnson of Tennessee stated that "when a person is an alien enemy, either being the *subject of a foreign jurisdiction* or by virtue of his own treason, he remains an alien enemy to this Government until Congress relieves him from that disability." *Id.* at 65 (citing CONG. GLOBE, 39th Cong., 1st Sess. 2400 (1866)) (emphasis added). This disability included "forfeiting all the [political] rights that he ever enjoyed under the Constitution," including "*the right to be represented in Congress* . . . the right to hold office . . . [and] every right except such as he may exercise under the law of nations." *Id.* (emphasis added).

Illegal aliens, by their very existence in the United States, are not subjecting themselves "fully to the laws." Their very presence flouts the law. Just one example is the failure to register their presence with immigration authorities once they have been in the country for 30 days or longer. 8 U.S.C. § 1302.[3] Illegal aliens, therefore, do not possess rights to apportionment

---

[3] *See also* Jon Feere, *The Myth of the "Otherwise Law-Abiding" Illegal Alien*, CENTER FOR IMM. STUDIES (Oct. 2013), *available at* http://cis.org/myth-law-abiding-illegal-alien.

or representation under the Constitution or the Fourteenth Amendment.

C. The Ninth Circuit's "Access Theory" upon which the District Court Relied is Misplaced and Anachronistic.

In *Garza*, one of the last major decisions dealing with the one-person, one-vote principle, the United States Court of Appeals for the Ninth Circuit held that Los Angeles County was constitutionally required to use total population in redistricting because the people, including those who are ineligible to vote, form the basis for representative government. 918 F.2d 763. The court de-emphasized the effects such an approach could have on the eligible voters in a particular district, claiming that basing districts on voter population would "abridge the right of aliens and minors to petition that representative." *Id.* at 775. This "access theory" used to justify the denial of electoral equality, however, conflicts with this Court's previous pronouncement in *Burns* that equality among electors is paramount, and that the term "persons" in Section 2 of the Fourteenth Amendment's "whole number of persons in each State"-clause is amenable to an interpretation that effectuates the one-person, one-vote principle and eschews vote dilution. 384 U.S. at 90.

Considering that equality among electors is constitutionally paramount, the viability of the rigid "access theory" created by the *Garza* majority, and

followed by the district court here, depends on whether an electoral district's general population figures can "track" that district's voter population. "[U]nder ordinary demographic conditions where noncitizen populations are relatively small and spread more or less proportionately throughout the electoral area, total population is a reliable proxy for voter population. But, when there are large numbers of nonvoters and when those nonvoters are disproportionately concentrated in certain areas, this correlation begins to break down." Krabill & Fielding, *No More Weighting: One Person, One Vote Means One Person, One Vote*, 16 TEX. L. & POL. 275, 282 (Spring 2012. "This correlative harmony between total population and voter population began to break down in the late 1980s and early 1990s when, driven by a large influx of concentrated illegal immigration, certain cities and counties faced the same disconnect between total population and voter population that Hawaii had faced in *Burns*." *Id.* Due to this radical change to our immigration policy and trends, "tracking" has become a constitutionally dysfunctional practice, especially in large immigrant receiving states such as Texas where non-citizens make up over 16 percent of the population.[4]

Given the difference in weight afforded to Texas's senate districts, the *Reynolds* Court today would

---

[4] *State and County QuickFacts*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/48000.html (last visited Aug. 04, 2015).

surely have found apportionment based on total population to be dilutive and inadequate. 377 U.S. at 579 ("Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State."). Further, this Court stated two years later in *Burns* that they "carefully left open the question what population was being referred to" thereby signaling that gross voter disparities in the future could and should be corrected. 384 U.S. at 91; *see also Chen v. City of Houston*, 532 U.S. 1046, 1047 (2001) (Thomas, J., dissenting from denial of certiorari) ("Having read the Equal Protection Clause to include a 'one-person, one-vote' requirement . . . we have left a critical variable in the requirement undefined. We have never determined the relevant 'population' that States and localities must equally distribute among their districts.").

When *Reynolds* was decided in 1964 the distinction between total and voter population had a similar relative position among electoral districts around the country. Disparities were slight and thus could have little impact on electoral equality. But since the passage of the Immigration and Nationality Act in 1965, the immigrant population has dramatically expanded, making the practice of "tracking" increasingly problematic in many parts of the country. According to the 1960 census, four years before the *Reynolds* decision, the national count of immigrants was 9.7 million, or 5 percent of the population. The

1980 census, the first full census following the Act's implementation in 1968, showed a jump in national immigrant figures to 14.1 million, or 6 percent of the population.[5] The last census in 2010 showed an immigrant-count of *40 million*, or *13 percent* of the population, a "historic high" according to the Census Bureau. This change in immigration policy since *Reynolds* has turned the United States into the largest importer of people in the world by a very large margin.[6]

If such an increase in the immigrant population was distributed evenly among the electoral districts of the 50 states, electoral inequality would perhaps not be a problem. But currently, according to census experts, 40 percent of all immigrants coming into the country settle in just five cities: New York, Los Angeles, Chicago, Miami and Houston.[7] The same study found that Houston and Dallas-Fort Worth were

---

[5] Elizabeth M. Grieco, *et al.*, *The Size, Place of Birth, and Geographic Distribution: 1960 to 2010*, U.S. CENSUS BUREAU (Oct. 2012), page 19, Figure 1, *available at* https://www.census.gov/population/foreign/files/WorkingPaper96.pdf.

[6] *International Migration 2013*, UNITED NATIONS (2013), page 1, Bar Chart: "Countries with the largest numbers of international migrants, 2000 and 2013 (millions)," *available at* http://www.un.org/en/development/desa/population/migration/publications/wallchart/docs/wallchart2013.pdf.

[7] Audrey Singer & Jill H. Wilson, *Immigrants in 2010 Metropolitan America: A Decade of Change*, BROOKINGS INST. (Oct. 13, 2011), *available at* http://www.brookings.edu/research/papers/2011/10/13-immigration-wilson-singer.

among six cities with the fastest immigration growth rates during the last census period.[8]

The velocity and concentration of the nation's immigration intake has created a "rotten borough" effect in many parts of the country, including Texas.[9] "Rotten borough" is a term from 18th and 19th century British politics used to describe a feature of industrialization where depopulated and usually pastoral districts could be carried by only a nominal amount of voters while other, newly industrialized districts had little to no representation at all. Until this apportionment system was reformed in the late 19th Century, these disparities were often purposely maintained by corrupt interests in order to control seats in the House of Commons.

University of Maryland Professor of Government James Gimpel prefers the term "hollow districts." In testimony before a congressional panel about the problems of total population-based apportionment, Prof. Gimpel spoke of the possibility under our current system of electoral districts actually having almost *no citizens* at all, and stated that "[n]early hollow districts do exist . . . and the proliferation of

---

[8] Audrey Singer, *Immigrants in 2010 Metropolitan America: A Decade of Change*, BROOKINGS INST. (Oct. 24, 2011), *available at* http://www.brookings.edu/research/speeches/2011/10/24-immigration-singer.

[9] *Rotten Borough Definition*, ENCYCLOPAEDIA BRITANNICA, http://www.britannica.com/topic/rotten-borough (last visited Aug. 04, 2015).

such districts does tax the citizen status of all Americans."[10]

Texas's system of disregarding electoral equality, relying on questionable court decisions, also has national implications. A relative increase in the population of one state can result in an increase in that state's share of representation in the House and its share of Electoral College votes, along with a decrease in the share of one or more other states. This makes apportionment a "zero-sum game." Wood, *supra* at 489. In Texas's case, it received four congressional seats (the most of any state) following the 2010 census;[11] seats which would have been distributed elsewhere but for the state's rapidly growing legal and illegal alien populations. In short, states with more citizens are being penalized.

Noting that the redistribution of seats moves from districts with high-citizen, but static, populations to districts with expanding non-citizen populations, Prof. Gimpel in his testimony described the prevailing perversity thusly:

---

[10] *Counting the Vote: Should only U.S. Citizens be included in Apportioning our Elected Representatives?: Hearing before House Subcommittee on Federalism and the Census*, 109th CONGRESS 88 (2005) (statement of James G. Gimpel, Professor of Government, University of Maryland, College Park), http://www.gpo.gov/fdsys/pkg/CHRG-109hhrg26074/html/CHRG-109hhrg26074.htm (last visited Aug. 04, 2015).

[11] Kristin D. Burnett, *Congressional Apportionment*, U.S. CENSUS BUREAU (Nov. 2011), page 2, Table 1, *available at* https://www.census.gov/prod/cen2010/briefs/c2010br-08.pdf.

> A Member of Congress who receives 200,000 votes will be thrown out, and the one who has received [ ] 50,000 will be retained only because of noncitizens in the apportionment phase. . . . [T]he perverse moral of the current system is clear: *The greater the proportion of citizens in a State, the fewer congressional seats that State receives.*[12]

University of California sociologist Roger Waldinger has observed these effects in his state of California noting that "[h]eavy immigrant densities make the Mexican-American districts into rotten boroughs, where only a small proportion of the adult population votes, a situation that does little to encourage electoral competition or mobilization." Roger Waldinger, *From Ellis Island to LAX: Immigrant Prospects in the American City*, 30 INT. MIGR. REV. 1078, 1085 (Winter 1996).

In the case at bar, Appellants' senate districts appear to have become "rotten boroughs" to a large degree. Their districts, numbers 1 and 4, have a respective Citizen Voting-Age Population (CVAP) of 568,780 and 533,010.[13] By contrast, senate districts 6 and 27, some of the largest immigrant-districts in the state, have respective CVAP of only 372,420 and 376,495. A "substantial variation" such as this cannot

---

[12] Gimpel testimony, *supra* note 10.

[13] *See* Senate Districts, *Texas Political Almanac*, http://www.txpoliticalalmanac.com/index.php?title=Main_Page (last visited Aug. 04, 2015).

be constitutionally sustainable. *Avery v. Midland County*, 390 U.S. 474, 485 (1968) (holding that the Constitution forbids substantial variation in drawing districts for units of local government). As a result of these disparities, the latter districts need far fewer voters to win, which is a direct affront to the one-person, one-vote principle. Indeed, voter turnout in the last general election for districts 1 and 4 was 294,353 and 250,521, respectively,[14] compared to district 6 and district 29 where only 131,490 and 169,398 voters showed up. District 27 had an even lower voter turnout of 113,542, but that seat was unopposed.

Much like the rotten boroughs of 18th and 19th century Britain, certain senate districts in Texas, those with greater amounts of legal and illegal aliens, are able to gain greater representation per voter. Change and adaptation is the cure for any anachronistic policy. This Court in *Burns* chose to respond to new, changing conditions. The lower court here erred by not doing likewise. As a result, the Court should rule in Appellants' favor.

---

[14] *Race Summary Report – 2012 General Election*, OFFICE OF THE SECRETARY OF STATE (Nov. 2012), http://elections.sos.state.tx.us/elchist164_state.htm (last visited Aug. 04, 2015).

D. Apportionment by Total Population Induces Abuse.

Total population apportionment incentivizes elected officials to push for so-called "sanctuary" policies or laws that encourage illegal aliens to migrate to their districts.[15] The result is an increase to their respective representative base and political advantage:

> The action of some local governments encouraging the settlement of unlawfully present aliens through sanctuary policies ultimately increases their respective State's representative base. Just as the Founding Fathers experienced problems with the varying rules of naturalization affecting the granting of the rights of citizenship without the consent of the Confederation, a similar dilemma presents itself when states allow and encourage unlawful aliens to settle within their respective borders. Without the consent of the Union, some localities and municipalities are openly permitting and encouraging unlawful aliens to settle, thus granting them the conditional political privilege of being apportioned and represented; all the while increasing their respective State's apportionment base.

---

[15] No precise definition of the term "sanctuary policy" or "sanctuary law" exists. Generally, it refers to an act, ordinance, or policy that limits or prohibits public officials from assisting or cooperating with federal immigration authorities seeking to apprehend and remove illegal aliens.

Charles, *supra* at 76. What is more, these areas also receive more funding from the federal government due to their outsized political representation.

Although the decision of where to settle is no doubt multifactorial for an illegal alien, the magnet effect of a sanctuary policy or law is clear. The recent tragic murder of an innocent young women by an illegal alien in the city of San Francisco proves this point. When the five-time deported admitted killer was asked by a reporter granted an interview if he returned to San Francisco because of its sanctuary law, he stated "yes."[16]

The data confirms that counties and cities that maintain sanctuary policies and laws also have a larger share of the national illegal alien population. Specifically, 3.2 million of the nation's 11 million illegal aliens reside in just 19 counties spread over metropolitan areas of New York-New Jersey, Los Angeles, Chicago, Miami and San Francisco-Oakland.[17] Each of these localities has a sanctuary policy or law. Similar to the overrepresentation enjoyed by certain senate districts in Texas, these five

---

[16] *San Francisco Shooter States He Chose City for Sanctuary Policies*, ABC 7 KGO (Jul. 06, 2015), *available at* https://www.youtube.com/watch?v=K2WoQ8Pcttk#t=117.

[17] *See* Unauthorized Immigrant Profiles – State and County Estimates, MIG. POL'Y INST., http://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles (last visited Aug. 04, 2015).

areas receive a full 8 seats in the House of Representatives which they should not have.

E. Continued Debasement of Citizens' Voting Power Due to Abuse of the Apportionment Process Demands a Swift Response from this Court.

The velocity and concentration of legal and illegal immigration makes resolution of the issue at bar more urgent than ever. Texas has failed to accommodate and adapt to its current immigration rates resulting in the diminishment of its citizens' political power – an unsustainable situation under *Reynolds* and the Fourteenth Amendment. *See Connor v. Finch*, 431 U.S. 407, 416 (1977) ("The Equal Protection Clause requires that legislative districts be of nearly equal population, so that each person's vote may be given equal weight in the election of representatives.").

Curiously, the district court asserts that complaints about the inherent unfairness of the political system must be remedied by that very same system. *See* Memorandum Opinion and Order of the United States District Court for the Western District of Texas, *Evenwel v. Perry*, No. 1:14-CV-335 (W.D. Tex. Nov. 05, 2014) ("We conclude that Plaintiffs are asking us to "interfere" with a choice that the Supreme Court has unambiguously left to the states absent the unconstitutional inclusion or exclusion of specific protected groups of individuals. We decline

the invitation to do so.") (citing *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996) and *Chen*, 206 F.3d 502). Since apportionment has already substantially affected the mechanism of political change, that is, the electoral process, Appellants cannot be limited to that process for recourse and remedy. Only this Court can remedy this situation. Indeed, this Court has weighed into the "political thicket" to address voting district-disparities numerous times since *Baker v. Carr*. 369 U.S. 186, 258, 259 (1962) (Clark, J., concurring) (stating "the majority of the people of Tennessee have no 'practical opportunities for exerting their political weight at the polls' to correct the existing 'invidious discrimination.'"); *see also Burns*, 384 U.S. at 93 (leaving open what a "permissible population basis" could be in the future.). How should citizens react if a legislative vote at the state or national level to correct the current system was defeated by votes from malapportioned districts? Further, legislators who benefit from decreasing the "weighting" of voting populations by increasing their numbers in districts with fewer legal and illegal aliens are arguably incentivized to block reforms. This Court, therefore, must act in order to bring the Fourteenth Amendment's one-person, one-vote principle back to its *Reynolds*-era moorings and end the inversion of electoral equality in Texas.

Resolution of the issue at bar is made even more urgent as the illegal immigration rate is likely to actually increase. This is predicted by numerous sources due to several factors, including lax border

security, collapsing detainment rates, and the "magnet" effect of mass legalization programs, such as the Deferred Action for Childhood Arrivals (DACA) program of 2012 and the Deferred Action for Parental Accountability (DAPA) program of 2014.[18]

In its ongoing litigation with the federal government over DACA and DAPA, Texas stated in its complaint that interviews with apprehended Unaccompanied Alien Children (UAC), "showed overwhelmingly" they were "motivated by the belief that they would be allowed to stay in the United States." Amended Complaint for Declaratory and Injunctive Relief at 14 (Docket No. 14), *Texas v. United States*, No. 1:14-CV-254 (S.D. Tex.). Texas also submitted written testimony supporting this conclusion from Dr. Karl Eschbach, a former demographer for the state and an expert in demographic trends and illegal immigration. Declaration of Karl Eschbach, Ph.D. supporting Plaintiffs (Docket No. 64-33), *Texas v. United States*, No. 1:14-CV-254 (S.D. Tex.). Eschbach told the court that legalization policies "encourage those eligible to stay in the United States and incentivizes other ineligible unauthorized immigrants to

---

[18] William A. Kandel, *et al.*, *Unaccompanied Alien Children: Potential Factors Contributing to Recent Immigration*, CONG. RES. SERV. (Jul. 03, 2014), *available at* http://fas.org/sgp/crs/homesec/R43628.pdf; *see also* Jennifer Scholtes, *CBP Chief: Policies may be Fuelling Spike in Minors Crossing Border Illegally*, CQ ROLL CALL (Apr. 2, 2014) and David Nakamura, *Influx of Minors across Texas Border Driven by Belief They will be Allowed to Stay in U.S.*, WASH. POST (Jun. 13, 2014).

remain in the United States with the hope that they will be the beneficiaries of a future adjustment of status." *Id.* at 3. Further, he stated, "the effect of DACA and DAPA is to incentivize residents of other countries to come to the United States." *Id.* at 11.

Besides Texas, the federal government has also admitted to the magnet effect policies can have on illegal immigration. In a recent case regarding the constitutionality of denying UACs a Sixth Amendment right to counsel, attorneys for the Justice Department argued that if such a grant was made, this could lead to increased immigration in the future. Order at 35 (Docket No. 114), *JEFM v. Holder*, No. C14-1026 (W.D. Wash. Apr. 13, 2015). ("Defendants assert that the effect of a ruling favorable to plaintiffs would be to encourage even more youngsters to journey illegally to the United States."). Further, the federal government has been predicting a bigger surge of UACs going forward. Officials have stated apprehensions for 2015 will rise to 127,000;[19] a giant increase from 2014's figure of 90,000 and a manifold increase from 2003-2011 annual levels which averaged around 7,000.[20]

---

[19] David Rogers, *Flood of child migrants a neglected challenge*, POLITICO (May 28, 2014), *available at* http://www.politico.com/story/2014/05/flood-of-child-migrants-a-neglected-challenge-107198.html.

[20] *Id.*

CONCLUSION

For the foregoing reasons, *amicus curiae* IRLI respectfully requests this Court to reverse the judgment of the district court in Appellants' favor.

Respectfully submitted,

DALE L. WILCOX
IMMIGRATION REFORM LAW INSTITUTE
25 Massachusetts Ave., NW, Suite 335
Washington, DC 20001
(202) 232-5590
litigation@irli.org
(Member of the Supreme Court Bar;
DC Bar pending; under direct
supervision of DC Bar member)

Supreme Court, U.S.
FILED
AUG 7 - 2015
OFFICE OF THE CLERK

No. 14-940

In The
Supreme Court of the United States

SUE EVENWEL, *et al.*,
Appellants,

v.

GREG ABBOTT, *et al.*,,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

---

BRIEF OF *AMICI CURIAE* JUDICIAL WATCH, INC. AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF APPELLANTS

Robert D. Popper
Counsel of Record
Chris Fedeli
Lauren M. Burke
JUDICIAL WATCH, INC.
425 Third Street, SW
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Counsel for Amici Curiae

Dated: August 7, 2015

LEGAL PRINTERS LLC, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 4

I. TEXAS' SENATE PLAN INFLICTS A CONSTITUTIONAL INJURY ON TEXAS CITIZENS BY DILUTING THEIR VOTING POWER 4

II. THE DISPUTE OVER TEXAS' LEGISLATIVE DISTRICTS IS JUSTICIABLE 8

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

U.S. Supreme Court

Baker v. Carr, 369 U.S. 186 (1962) ..... *passim*

Bartlett v. Strickland, 556 U.S. 1 (2008) 13

Brown v. Thomson, 462 U.S. 835 (1983) 14

Bush v. Vera, 517 U.S. 952 (1996) 12

Connor v. Finch, 431 U.S. 407 (1977) 14

Gray v. Sanders, 372 U.S. 368 (1963) 4

Hadley v. Junior College Dist.,
397 U.S. 50 (1970) 6

Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964) 11

Reynolds v. Sims,
377 U.S. 533 (1964) ..... *passim*

Roman v. Sincock, 377 U.S. 695 (1964) 11

Swann v. Adams, 385 U.S. 440 (1967) 14

White v. Regester, 412 U.S. 755 (1973) 14

WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964) 10

U.S. Courts of Appeals

Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990) 3, 6, 8, 9

Reyes v. City of Farmers Branch Tex., 586 F.3d 1019 (5th Cir. 2009) 13

U.S. District Courts

Benavidez v. City of Irving, 638 F. Supp. 2d 709 (N.D. Tex. 2009) 13

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1 2

Tex. Const. art. XVII, § 1 ..... 3, 12

Tex. Const. art. XVII, § 2 (repealed) 3, 12

OTHER AUTHORITIES

Daniel D. Polsby and Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301 (1991) 12

Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 Ariz. St. L.J. 1237 (Fall 2012) 11

Henry J. Kaiser Family Foundation, *Population Distribution by Citizenship Status*, available at http://kff.org/other/state-indicator/distribution-by-citizenship-status/ 8

Illegal Immigration, Population Estimates in the United States, 1969-2011, Illegal Immigration Solutions, available at http://immigration.procon.org/view.resource.php?resourceID=000844 9

Initiative & Referendum Institute at the University of Southern California, *State I&R*, available at http://www.iandrinstitute.org/statewide_i&r.htm.....3

National Conference of State Legislatures, *Initiative, Referendum and Recall*, available at http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx.....3

National Conference of State Legislatures, *Voting By Nonresidents and Noncitizens*, February 27, 2015, http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx 2

Nolan Malone, *et al.*, *The Foreign-Born Population: 2000*, U.S. Census Bureau (Dec. 2003), available at http://www.census.gov/prod/2003pubs/c2kbr-34.pdf 9

Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 YALE L.J. 65 (1962).....11

Yesenia D. Acosta, Luke J. Larsen, and Elizabeth M. Grieco, *Noncitizens Under Age 35: 2010–2012*, American Community Survey Briefs (Feb. 2014), available at http://www.census.gov/prod/2014pubs/acsbr12-06.pdf 9

INTEREST OF THE *AMICI CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational organization that seeks to promote transparency, accountability, integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as an *amicus curiae* in this Court on a number of occasions.

The Allied Educational Foundation ("AEF") is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study. AEF regularly files *amicus curiae* briefs as a means to advance its purpose and has appeared as an *amicus curiae* in this Court on a number of occasions.

Amici believe that the decision by the U.S. District Court for the Western District of Texas (the "Western District") raises an important issue of constitutional law concerning reapportionment and individual voting rights. In particular, *amici* are concerned that the Western District's ruling allows the State of Texas intentionally to dilute the voting

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici curiae* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. The parties have given blanket consent to the filing of *amicus* briefs, and have filed letters of consent with this Court.

power of certain citizens compared to the voting power of other citizens. Such a result denies Texas citizens the "one person, one vote" guarantee of the Equal Protection Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1. *Amici* are troubled by the fact that Texas is devaluing the votes of certain citizens by improperly counting noncitizen nonvoters when determining the populations of legislative districts. Under the laws of all fifty states, only citizens may vote in either statewide or federal elections.[2] Texas' scheme to give weight to nonvoting noncitizens along with lawful voters is contrary to the principles embodied in citizen voting laws.

SUMMARY OF THE ARGUMENT

Texas' use of total population as the sole basis for measuring "equal population" in its statewide districting plan creates a grossly uneven distribution of voters in each district. This imbalance violates the "one person, one vote" principle first articulated in *Baker v. Carr*, 369 U.S. 186 (1962). This principle protects voters from having their votes diluted by malapportionment. It does *not* protect any other

---

[2] National Conference of State Legislatures, *Voting By Nonresidents and Noncitizens*, February 27, 2015, ("No state has extended noncitizen voting to statewide elections."), http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx ; *See also* Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 Ariz. St. L.J. 1237, 1275-1276 (Fall 2012) ("Today, every state prohibits noncitizens from voting in federal elections. Federal law, too, prohibits aliens from voting in federal elections.").

abstract representational interests that might be asserted by noncitizens or nonvoters.

Texas' redistricting scheme results in vote dilution because the votes of "those eligible to vote" are "given less weight than that of electors in another location." *Garza v. County of Los Angeles*, 918 F.2d 763, 782 (9th Cir. 1991) (Kozinski, J., concurring in part and dissenting in part). The principles established in *Baker* and its progeny require Texas to redraw its legislative districts.

The Appellants' claim is justiciable because the deliberate malapportionment of citizens at issue in this case resists correction by ordinary democratic means. The size of the noncitizen population makes the citizen malapportionment on display in Texas particularly egregious. Further, Texas has no initiative process or referendum system,[3] and any proposed amendment to the Texas Constitution requires a legislative referral approved by a supermajority of two-thirds of both houses.[4] Thus, judicial intervention affords the only realistic

---

[3] *See* National Conference of State Legislatures, *Initiative, Referendum and Recall*, available at http://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx (visited March 5, 2015); Initiative & Referendum Institute at the University of Southern California, *State I&R*, available at http://www.iandrinstitute.org/statewide_i&r.htm (visited March 5, 2015).

[4] Tex. Const. art. XVII, § 1. Texas' provision for calling a constitutional convention was repealed in 1999. Tex. Const. art. XVII, § 2 (repealed).

prospect for Texas voters to obtain relief from the constitutional injury of vote dilution.

This Court should enjoin the citizen malapportionment embodied in Texas' Senate district plan for the same reason that it enjoined the malapportionment at issue in *Reynolds v. Sims*, 377 U.S. 533 (1964) and related cases. Such an order is necessary to ensure the sound functioning of our democratic processes.

For these reasons, *amici* urge the Court to reverse the judgment of the Western District.

ARGUMENT

I. TEXAS' SENATE PLAN INFLICTS A CONSTITUTIONAL INJURY ON TEXAS CITIZENS BY DILUTING THEIR VOTING POWER.

In a consistent series of landmark rulings, this Court has held that diluting the efficacy of voters' votes by malapportionment is a constitutional injury. *See Baker*, 369 U.S. at 207-08 (voters had standing to assert that "a gross disproportion of representation to voting population" was a "classification" that "disfavors" them by "placing them in a position of constitutionally unjustifiable inequality *vis-a-vis* [other] voters"); *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (in statewide primaries there is "no constitutional way by which equality of voting power may be evaded."); *Reynolds*, 377 U.S. at 568 (in state and local elections, "[a] citizen, a

qualified voter, is no more nor no less so because he lives in the city or on the farm.").

However, this Court has not gone far enough to close the loophole that Texas now exploits. Texas created districts that are equal in total population but decidedly unequal in citizen population. As a result, the votes of some of Texas' citizens have, by some measures, almost twice the electoral power of the votes of other Texas citizens. *See* Jurisdictional Statement ("Juris. Stmnt."), No. 14-940 (Feb. 2, 2015) at 9, Table 2 (showing a maximum voting power discrepancy in non-suspense voter registration for 2008 of 1 to 1.84). The voting power of citizens based on Citizen Voting Age Population ("CVAP") varies between Texas Senate districts by more than 1.5 times. *Id.* The votes of those Texas citizens who are not favored by the Texas legislature are thereby diluted.

This simple tactic allows Texas' legislators to argue that they are complying with the constitutional, "one person, one vote," requirement, at the very moment that they are "weighting" the votes of their supporters by placing them in districts with greater numbers of nonvoting noncitizens. The ultimate consequence of this scheme is that legislators are able to enhance their odds of winning reelection without having to engage in the bothersome and time-consuming task of actually persuading voters to vote for them. The Appellants in this case have amply demonstrated the effect on voting power that is the result of the Texas legislature's tactic of citizen malapportionment.

Importantly, *Reynolds* and its progeny protect against precisely this kind of vote dilution, while they do not protect the kind of "representational interests" which Texas argues requires only total population equality. The "one person, one vote" principle prevents the dilution of citizens' voting power, and it has no meaning apart from this purpose. As articulated by this Court, the principle requires that "each district must be established on a basis that will insure, as far as practicable, that equal number of *voters* that *vote* for equal number of representatives." *Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970) (emphasis added). The weighting of citizens' votes so that one person has almost twice the ability to elect representatives as another citizen is vote dilution in violation of this principle. By minimizing the voting strength of substantial numbers of voters, Texas' plan disregards true electoral equality. But it is electoral equality, and not representational equality, that is at the heart of the "one person, one vote" principle. *See Garza*, 918 F.2d at 784 (Kozinski, J., concurring in part and dissenting in part) (one person, one vote protects a right uniquely held by citizens, and it is a dilution of that right to allow noncitizens to share it).

In *Reynolds*, this Court described the constitutional injury arising from malapportionment in terms of vote dilution, and not representational interests:

> [I]f a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times

> the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted...Of course, the effect of state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State.

377 U.S. at 562-63. As the Court concluded: "[w]eighting the votes of citizens differently, *by any method or means*, merely because of where they happen to reside, hardly seems justifiable." *Id.* at 563 (emphasis added).

II. THE DISPUTE OVER TEXAS' LEGISLATIVE DISTRICTS IS JUSTICIABLE.

The claims in this case are justiciable. Texas' large noncitizen population was deliberately allocated among Senate districts so as to dilute the votes of some Texas citizens and to amplify the votes of others. Those citizens who were harmed cannot obtain a remedy through the ordinary workings of the democratic process. *Baker* and its progeny already have established that vote dilution caused by malapportionment is justiciable. Accordingly, this Court should enjoin the use of Texas' Senate districts because they embody and rely on citizen malapportionment. Further, this Court should direct that Texas' Senate districts be apportioned on the basis of citizen voting-age population.

Noncitizen populations in Texas are significantly larger than in other states, and larger than in previous years. Texas has one of the highest noncitizen populations in the United States at 11 percent of total state population – tied for second in the U.S., behind only California.[5] Indeed, the number of unlawfully present aliens throughout the U.S. has nearly tripled since *Garza*, from approximately 3.4 million in 1992 to 11.5 million in

---

[5] *See* Henry J. Kaiser Family Foundation, *Population Distribution by Citizenship Status*, available at http://kff.org/other/state-indicator/distribution-by-citizenship-status/ (last visited February 5, 2015).

2011.[6] When *Garza* was decided there were approximately 11 million noncitizens living in the U.S. (including both lawfully and unlawfully present foreign nationals), or about 4.4 percent of the U.S. population at that time.[7] By 2012 this figure had doubled to approximately 22 million noncitizens in the U.S, or roughly 7 percent of the current U.S. population.[8] Because of its large noncitizen population, Texas is better situated than other states to engage in vote dilution by means of citizen malapportionment.

Malapportionment in general is justiciable precisely because it cannot be remedied by the ordinary operation of the democratic process. This Court recognized this point when it first ventured into the "political thicket" to address the equal protection implications of malapportioned voting districts. *See Reynolds*, 377 U.S. at 566.

---

[6] *Illegal Immigration, Population Estimates in the United States, 1969-2011*, Illegal Immigration Solutions, available at http://immigration.procon.org/view.resource.php?resourceID=000844 (visited Feb. 25, 2015).

[7] Nolan Malone, *et al.*, *The Foreign-Born Population: 2000*, U.S. Census Bureau (Dec. 2003), page 3, Table 1, available at http://www.census.gov/prod/2003pubs/c2kbr-34.pdf (showing noncitizens accounting for 59.5 percent of the United States' total foreign-born population of 19,767,316 in 1990, or about 4.4 percent of the U.S. population of 248,709,873).

[8] Yesenia D. Acosta, Luke J. Larsen, and Elizabeth M. Grieco, *Noncitizens Under Age 35: 2010–2012*, American Community Survey Briefs, p. 2 (Feb. 2014), available at http://www.census.gov/prod/2014pubs/acsbr12-06.pdf.

Justice Clark, concurring in *Baker*, explained that

> [t]he majority of the people of Tennessee have "no practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination." Tennessee has no initiative and referendum ... The majority of the voters have been caught up in a legislative strait jacket. ... [T]he legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented. The people have been rebuffed at the hands of the Assembly; they have tried the constitutional convention route, but since the call must originate in the Assembly it, too, has been fruitless.

369 U.S. 186, 259 (1962) (Clark, J. concurring).

A long line of apportionment cases following *Baker* explicitly referred to the absence of a democratic remedy in justifying the Court's intervention. *See Reynolds*, 377 U.S. at 553 ("No effective political remedy to obtain relief against the alleged apportionment of the Alabama Legislature appears to have been available. No initiative procedure exists" and constitutional amendments require "three-fifths of the members of both houses of the legislature"); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 651-52 (1964) ("No adequate political

remedy to obtain relief against alleged legislative malapportionment appears to exist in New York. No initiative procedure exists under New York law," and existing malapportionment would affect elections to any state constitutional convention); *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656, 669-70 (1964) (several reapportionment bills have "failed to pass because of opposition by legislators from the less populous counties," a constitutional amendment was "unavailable, as a practical matter," and seats at a constitutional convention "would be based on the allocation of seats in the allegedly malapportioned General Assembly."); *Roman v. Sincock*, 377 U.S. 695, 706 (1964) ("repeated attempts to reapportion the legislature or to call a constitutional convention" failed, "[n]o initiative and referendum procedure exists in Delaware," and "two-thirds of both houses of two consecutive state legislatures is required in order to amend the State Constitution."). *See also* Thomas I. Emerson, *Malapportionment and Judicial Power*, 72 Yale L.J. 65, 79 (1962) ("The problem of malapportionment is one which peculiarly fits such a judicial role. For the usual methods by which a majority can constitutionally gain its ends are blocked.").

In all of these cases, this Court recognized that the problem of malapportionment cannot be resolved simply by holding more elections. Legislators who represent malapportioned districts have no incentive to alter the electoral system that keeps them in office. Without judicial intervention, legislators will continue to "weight" the votes of their partisan

supporters with impunity. Indeed, legislators gain the ability to select themselves, at least to a degree, and they acquire this power at the voters' expense.[9]

What was true in the original malapportionment cases is equally true of the citizen malapportionment that is at issue in this case. The same inability to obtain redress by democratic means is apparent in Texas. There currently is no initiative process. Any proposed amendment to the Texas Constitution requires a legislative referral approved by a supermajority of two-thirds of both houses. Tex. Const. art. XVII, § 1. Such a referral is unlikely in the best of circumstances, but it is all but unthinkable where the legislators who would have to make the referral are elected from districts where citizens are deliberately malapportioned. Finally, Texas' provision for calling a constitutional convention was repealed in 1999. Tex. Const. art. XVII, § 2 (repealed).

---

[9] The pathology and illegitimacy of "self-constitutive" assemblies was discussed in the context of gerrymandering in Daniel D. Polsby and Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 305 (1991) ("The members of a partially self-constituted legislature depend to a degree upon one another rather than upon their constituents ... Whatever 'representation' means, it cannot possibly mean that."). *See also Bush v. Vera*, 517 U.S. 952, 963 (1996) (the result of districts drawn to protect incumbents "seems not one in which the people select their representatives, but in which the representatives have selected the people.")

Accordingly, judicial intervention is warranted, and this Court should enjoin the use of Texas' current Senate districts.

The Court should, moreover, order the Texas legislature to utilize CVAP in equalizing district populations. CVAP is the most appropriate standard because it accounts both for citizenship and for the age-eligible status of citizens. Defining the "one person, one vote" standard in terms of CVAP would prevent the citizen malapportionment engaged in by the Texas legislature. It also would prevent legislatures from diluting voters' voting power by deliberately creating districts with different age demographics.

CVAP statistics are recognized and relied upon in voting cases, in particular in designing remedial districts under Section 2 of the Voting Rights Act, 52 U.S.C. § 10301. *See e.g., Reyes v. City of Farmers Branch Tex.*, 586 F.3d 1019, 1023 (5th Cir. 2009) ("A 'voting majority' implies that the majority can actually vote, so the inquiry must take account of both citizenship and voting age."); *Benavidez v. City of Irving*, 638 F. Supp. 2d 709 (N.D. Tex. 2009) (to prevail under Section 2, "a plaintiff must show that it is possible to draw an election district of an appropriate size and shape where the citizen voting age population of the minority group exceeds 50% of the relevant population in the illustrative district."); *Bartlett v. Strickland*, 556 U.S. 1, 32 (2008) ("whether a district with a minority population under 50% of the CVAP may redress a violation of § 2 is a question of fact...").

In Texas, the current CVAP deviations between legislative districts vary by more than forty percent. See Juris. Stmnt., No. 14-940 (Feb. 2, 2015) at *9 (showing CVAP deviation of 1:1.54, or 40.08% deviation). This population deviation exceeds the ten percent required for a prima facie case of discrimination. *Brown v. Thompson*, 462 U.S. 835, 842 (1983) (citing *Connor v. Finch*, 431 U.S. 407, 418 (1977); *White v. Regester*, 412 U.S. 755, 764 (1973)). As this Court has explained:

> *De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy.... [Thus] variations from a pure population standard might be justified by such state policy considerations as the integrity of political subdivisions, the maintenance of compactness and contiguity in legislative districts or the recognition of natural or historical boundary lines.

Swann v. Adams, 385 U.S. 440, 444 (1967).

The Court can and should order Texas to remedy the imbalance in its CVAP populations by redrawing its legislative districts.

CONCLUSION

For all of the foregoing reasons, the judgment of the Western District of Texas should be reversed.

Respectfully submitted,

Robert D. Popper
Counsel of Record
Chris Fedeli
Lauren M. Burke

JUDICIAL WATCH, INC.
425 Third Street SW,
Washington, DC 20024
(202) 646-5172
rpopper@judicialwatch.org

Counsel for Amici Curiae

August 7, 2015

No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, ET AL.,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF *AMICUS CURIAE* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Linda C. Goldstein
Neil A. Steiner
Rachel B. Swartz
Cara Schmidt
Mari C. Stonebraker
Diana C. Wang
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036

G. Eric Brunstad, Jr.
Counsel of Record
DECHERT LLP
90 State House Square
Hartford, Connecticut 06103
(860) 524-3999
eric.brunstad@dechert.com

(additional counsel listed on reverse of page)

Jon M. Greenbaum
Robert A. Kengle
Ezra D. Rosenberg
M. Eileen O'Connor
Dorian Spence
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW
Suite 400
Washington, DC 20005

Counsel for Amicus Curiae

Table of Contents

PAGE

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. THIS COURT'S JURISPRUDENCE COUNSELS AGAINST CHANGING ENTRENCHED LAW ON STATE LEGISLATIVE APPORTIONMENT 4

A. This Court's Well-Established Precedents Have Long Permitted Legislative Apportionment Based on Total Population 5

B. Forty-one States Have Relied on the Well-Settled Principle that the Total Population Metric is Valid and Have Used it to Apportion Legislative Districts 12

C. There Has Been No Change in Factual Circumstances that Would Justify Upending the States' Reliance Interest 23

D. Mandating CVAP Would Inevitably Increase Judicial Involvement in State Legislative Apportionment 28

II. THE APPLICABILITY OF THE POLITICAL QUESTION DOCTRINE IS NOT PRESENTED IN THIS APPEAL 33

A. There is No Basis in the Language of the District Court's Decision to Conclude that it Invoked the Political Question Doctrine 34

Table of Contents
(continued)

PAGE

B. Regardless of the District Court's Rationale, the Political Question Doctrine is Not Implicated 36

CONCLUSION 38

Table of Authorities

CASES — PAGE

Baker v. Carr, 369 U.S. 186 (1962) ..... *passim*

Brown v. Board of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954) 23

Below v. Gardner, 963 A.2d 785 (N.H. 2002) 12, 15

Brown v. U.S., 486 F.2d 658 (8th Cir. 1973) 11

Brulotte v. Thys Co., 379 U.S. 29 (1964) 29

Burns v. Richardson, 384 U.S. 73 (1966) ..... *passim*

Bush v. Vera, 517 U.S. 952 (1996) 33

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000) 10

Clark v. Putnam Cnty., 293 F.3d 1261 (11th Cir. 2002) 11

Connor v. Johnson, 330 F. Supp. 506 (S.D. Miss. 1971) 18

Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996) 10

Davis v. Bandemer, 478 U.S. 109 (1986) 37

Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999) 31

Dickerson v. U.S., 530 U.S. 428 (2000) 4, 22

Evenwel v. Perry, No. A–14–CV–335–LY–CH-MHS, 2014 WL 5780507 (W.D. Tex. Nov. 5, 2014) 35

Gaffney v. Cummings, 412 U.S. 735 (1973) ..... *passim*

Garza v. Cnty. of Los Angeles, 918 F.2d 763 (9th Cir. 1990) 10, 22, 33

Gray v. Sanders, 372 U.S. 368 (1963) 2

Growe v. Emison, 507 U.S. 25 (1993) 36

Karcher v. Daggett, 462 U.S. 725 (1983) 9

Kimble v. Marvel Entertainment, LLC, 135 S. Ct. 2401 (2015) 4, 29, 30

Kiowa Tribe of Okla. v. Manuf. Techs., Inc., 523 U.S. 751 (1998) 23

Kirkpatrick v. Preisler, 394 U.S. 526 (1969) 22

Maestas v. Hall, 274 P.3d 66 (N.M. 2012) 18

McGovern v. Sec'y of State, 635 A.2d 498 (N.H. 1993) 15

Michigan v. Bay Mills Indian Community, 134 S. Ct. 2024 (2014) 23

Miller v. Schaffer, 320 A.2d 1 (Conn. 1972) 17

Miranda v. Arizona, 384 U.S. 436 (1966) 21, 22

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 23

Perry v. Perez, 132 S. Ct. 934 (2012) 36

Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833 (1992) 21

Reynolds v. Sims, 377 U.S. 533 (1964) ..... *passim*

Roe v. Wade, 410 U.S. 113 (1973) 21

Runyon v. McCrary, 427 U.S. 160 (1976) 23

Toombs v. Fortson, 241 F Supp. 65 (N.D. Ga. 1965) 17

Upham v. Seamon, 456 U.S. 37 (1982) 36

Vieth v. Jubelirer, 541 U.S. 267 (2004) 37

Wesberry v. Sanders, 376 U.S. 1 (1964) 7, 20

West Coast Hotel, Co. v. Parrish, 300 U.S. 379 (1937) 30

Wilson v. Fallin, 262 P.3d 741 (Okla. 2011) 12

STATUTES

10 ILL. COMP. STAT. 91/5 (2011) 14

CAL. ELEC. CODE § 21003 (West 2013) 19

DEL. CODE ANN. Title 29, § 804 (1964) 19

IDAHO CODE ANN. § 72-1506 (West 2009.) 17

IOWA CODE § 42.4(1)(a)(1980) 14

MD. CODE ANN., ELEC. LAW § 8-701 19

MICH. COMP. LAWS ANN. § 4.261 ..... 12, 17

MONT. CODE ANN. § 5-1-115 (2003) 15

N.D. CENT. CODE § 54-03-01.5(5) (1975) 18

N.Y. LEGIS. LAW § 83-m (McKinney 2010) 20

OR. REV. STAT. ANN. § 188.010 (West 1979) 16

S.D. CODIFIED LAWS § 2-2-41 (2011) 16

VA. CODE ANN. § 30-265 (2004) 16

VT. CODE ANN. § 1902–03. (1965) 18

WASH. REV. CODE ANN. § 44.05.090 (West 1990) .. 20

CONSTITUTIONS

U.S. CONST. art. I, § 2 & amend. XIV 20, 30

ALA. CONST. § 198, § 200 14

ALASKA CONST. art. VI §§ 3 & 6 ..... 14, 20

ARIZ. CONST. art. IV, pt. 2 § 1 ..... 14, 20

ARK. CONST. art. VIII, §§ 2–3 14

CAL. CONST. art. XXI, § 2 19

COLO. CONST. art. V, §§ 46–47 14

CONN. CONST. art. III, §§ 5–6 17

FLA. CONST. art. III, § 21 14

GA. CONST. art. III, § 2 17

HAW. CONST. art. IV, §§ 4 & 6 19

ILL. CONST. art. IV, § 3 14

IND. CONST. art. IV, § 5 14

IOWA CONST. art. III, § 34 14

KAN. CONST. art. X, § 1 19

KY. CONST. § 33 14

LA. CONST. art. III, § 6 ..... 14, 20

MASS. CONST. pt. 2 art. CI 14

MD. CONST. art. III, § 4–5 19

ME. CONST. art. IV, pt. 1, § 2 & pt. 2, § 2 19

MINN. CONST. art. IV, § 2 15

MISS. CONST. art. 13, § 254 18

MO. CONST. art. III, §§ 2 & 5 15

MONT. CONST. art. V, § 14 ..... 15, 20

N.C. CONST. art. II, §§ 3 & 5 15

N.H. CONST. pt. 2, art. IX, IX.a, & XXVI 15

N.J. CONST. art. IV, § 2 15

N.M. CONST. art. IV, § 3 18

N.Y. CONST. art. III, §§ 4–5 20

NEB. CONST. art. III, § 5 19

NEV. CONST. art. IV, §§ 5 & 13 15

OHIO CONST. art. XI, §§ 2, 4, 9, & 11 15

OKLA. CONST. art. V, § 9A 15

OR. CONST. art. IV, § 6 16

PA. CONST. art. II, §§ 16–17 ..... 16, 20

R.I. CONST. art. VII, § 1 & art. VIII, § 1 16

S.C. CONST. art. III, §§ 3 & 6 16

S.D. CONST. art. III, § 5. ..... 16, 20

TENN. CONST. art. II, §§ 4 & 6 ..... 8, 16

VA. CONST. art. II, § 6 ..... 16, 20

W. VA. CONST. art. VI, §§ 4 & 7 16

WASH. CONST. art. II, § 43 20

WIS. CONST. art. IV, § 3 16

WYO. CONST. art. III, § 3 16

OTHER AUTHORITIES

1960 Long-Form Census Questionnaire, http://www.census.gov/history/-pdf/1960censusquestionnaire-2.pdf 6

Gibson and Jung, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850 to 2000,* Population Division Working Paper No. 81, U.S. Census Bureau, (2006) 25

J. Fishkin, *Weightless Votes*, 121 Yale L.J. 1888 (2012) 22, 23

John F. Kennedy, Jr., *A Nation of Immigrants* (1964) 24

Jorge Chapa, et al., *Redistricting: Estimating Citizen Voting Age Population*, The Chief Justice Earl Warren Institute On Law and Social Policy, Research Brief, September 2011 31

Office of Legislative Research & Gen. Counsel, Redistricting Comm. Report (2001) 18

Trevelyan Grieco, et al., *The Size, Place of Birth, and Geographic Distribution of the Foreign-Born Population in the United States: 1960 to 2010*, Population Division Working Paper No. 96, U.S. Census Bureau (2012).....24

INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee" or "Committee") is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and inequality of opportunity. The principal mission of the Committee is to secure equal justice for all through the rule of law.

Since 1965, the Lawyers' Committee has endeavored to protect the right to vote and to ensure that the right is afforded equally. The Lawyers' Committee has a strong interest in protecting the voting rights of all communities and in opposing efforts to undermine the voting strength of historically under-represented groups. As a nonprofit organization that represents the private bar and marshals its leadership and skills in service to this cause, the Committee is uniquely well-suited to address the question presented.

SUMMARY OF THE ARGUMENT

This case involves a thoroughly settled question. The decision below does not conflict with any authority from this Court or any court of

---

[1] No counsel for any party has authored this brief in whole or in part, and no party or counsel for a party has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6. Both Appellants and Appellees have consented to the filing of this brief. Appellants' and Appelles' blanket consents have been filed.

appeals. Nor is there a real disagreement among the states. For decades, the overwhelming majority of states have adhered to apportionment by total population as the hallmark of the one-person, one-vote principle that protects one of our most cherished and fundamental rights—the right to vote. In seeking to dislodge the total population standard, Appellants would unsettle the foundation on which the one-person, one-vote principle has long rested. If successful, Appellants' efforts would force forty-one states to scuttle to re-write their apportionment laws in order to comply with some new, untested standard. Not only have Appellants failed to show that their preferred approach is a superior, constitutionally required directive, but adopting it would spawn decades of protracted litigation over its implementation.

In the half-century since this Court first announced the one-person, one-vote principle in *Gray v. Sanders*, 372 U.S. 368 (1963), and *Reynolds v. Sims*, 377 U.S. 533 (1964), not a single court has held that the use of total population as the basis for apportionment is *impermissible*. To the contrary, both the lower courts and the states have consistently relied on this Court's sanctioning of total population apportionment in *Reynolds* and its progeny. The near-completeness of this reliance cannot be overstated. Forty-one states use total population as their sole basis for apportionment; thirty-two do so through constitutional provisions. Moreover, thirty-three states amended their constitutional provisions or statutes after *Reynolds* was decided to hew to this Court's seminal rulings.

As this Court's precedents establish, analysis of whether it is appropriate to overturn prior law in order to institute the new approach Appellants prefer requires the consideration of a number of important jurisprudential factors. Critically, these factors are designed specifically to guard against upending important, established practices, particularly those based on this Court's prior constitutional rulings. In this instance, none of the factors favors abandoning the status quo. Indeed, they all counsel strongly against it. In particular, the relevant circumstances are not materially different from when this Court decided *Reynolds*, the relevant precedents have not been eroded, and the total population metric has proved neither to be unworkable nor in conflict with other relevant precedents.

In addition, Appellants' resort to the "political question" doctrine is a smokescreen. The district court did not once mention a "political question" and the law is well-settled—the doctrine does not apply to the conduct of state elections.

Over the last fifty years, the total population metric has been a successful, neutral redistricting criterion that has long vindicated the values underlying the one-person, one-vote standard and mitigated the inequalities it was designed to overcome. Under this Court's standards for reconsidering its own prior decisions, there is no justification for forbidding the states from continuing to use it.

For these reasons, the decision below should be affirmed.

ARGUMENT

I. THIS COURT'S JURISPRUDENCE COUNSELS AGAINST CHANGING ENTRENCHED LAW ON STATE LEGISLATIVE APPORTIONMENT.

This Court has long recognized the need for stability and restraint when asked to overrule a prior precedent, particularly one that has formed the foundation for the states' subsequent legislative choices. Under the doctrine of *stare decisis*, and in deference to the states' legislative powers and prerogatives, the default presumption is to uphold a precedent absent a "special justification."[2] Though each instance is unique, the Court has looked repeatedly to three factors in particular when faced with a request to reverse a previous holding: (1) changed factual assumptions, (2) erosion of legal precedent; and (3) conflicting or unworkable legal precedent. Conversely, the

---

[2] "While 'stare decisis is not an inexorable command,' particularly when we are interpreting the Constitution, 'even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some special justification.'" *Dickerson v. U.S.*, 530 U.S. 428, 443 (2000)(internal citations omitted). *See also, Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015)("[I]t is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a 'special justification'—over and above the belief 'that the precedent was wrongly decided.'")(internal citation omitted).

absence of any of these factors weighs heavily in favor of retaining a prior precedent. Indeed, even where a special justification for overruling a prior precedent may exist, entrenched reliance on a clear legal rule is a sufficient reason, in and of itself, to refrain from reversing a prior decision.

Viewed from this perspective, it is clear that this Court's precedents permitting states to use total population as an apportionment metric should not be overruled.

A. This Court's Well-Established Precedents Have Long Permitted Legislative Apportionment Based on Total Population.

The state of the law is unquestionably settled—apportionment based on total population has been approved by this Court and the Courts of Appeals in each and every instance in which the question has been considered. Since this Court first addressed the issue in *Reynolds*, every court to have addressed the question has upheld the constitutionality of apportionment using total population as a base. This is unsurprising because the total population metric is the very remedy designed to address the problem of vote dilution faced in *Reynolds*. The practical effect of these decisions has been overwhelming: Forty-one of the fifty states use total population apportionment and none use the citizen voting age population ("CVAP") measure that Appellants advocate.

Reynolds established that the Equal Protection Clause requires states to equalize the

populations of their election districts to protect the right to vote from dilution. At issue in *Reynolds* was Alabama's then-current apportionment scheme and two competing apportionment proposals. Despite a state constitutional requirement to do so, Alabama had failed to reapportion its legislative districts since 1901. *Reynolds*, 377 U.S. at 540.

The Court expressly evaluated equalization, and therefore the constitutionality of the three apportionment schemes, based on *total* population and not some other standard. In reciting the relevant facts necessary to its decision, the court relied on the 1960 census,[3] which did not include citizenship data. *See* 1960 Long-Form Census Questionnaire at http://www.census.gov/history/.pdf/1960censusquestionnaire-2.pdf. The Court noted: (1) under each of the three schemes, each senatorial district would have only one senator, no matter the population of the district according to the 1960 census; *Reynolds*, 377 U.S. at 545; and (2) under the proposed constitutional amendment, "serious disparities from a population-based standard remained. Montgomery County, with 169,210 people, was given only four seats, while Coosa County, with a population of only 10,726, and Cleburne County, with only 10,911, were each allocated one representative." *Id.* at 549. In addition, (3) under the proposed statute, "about 37% of the State's *total population* would reside in

---

[3] "The evidence adduced at trial before the three-judge panel consisted primarily of figures showing the population of each Alabama county and senatorial district according to the 1960 census." *Reynolds*, 377 U.S. at 545.

counties electing a majority of the members of the Alabama House, with a maximum population-variance ratio of about 5-to-1." *Id.* at 549–50 (emphasis added).

Discussing the disparity between the various counties' representation and their *total population*, the Court opined that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State," *id.* at 560–61, citing *Wesberry v. Sanders*, 376 U.S. 1 (1964), and further held that "[p]opulation is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies." *Reynolds*, 377 U.S. at 567. Critically, the "population" explicitly discussed and relied upon was *total* population.[4] The law, as set forth in *Reynolds*, is thus clear: apportionment on a total population basis protects the one-person, one-vote principle and is constitutional.

Moreover, at the time the Court decided *Reynolds* and sanctioned total population as an apportionment base, it understood that districts of equal population would not necessarily be districts of equal numbers of citizens or equal numbers of qualified voters. In *Baker v. Carr*, 369 U.S. 186 (1962), relied upon in *Reynolds*, the Court held that

---

[4] "[T]otal population figures were in fact the basis of comparison in th[e] [*Reynolds v. Sims*] case and most of the others decided that day." *Burns v. Richardson*, 384 U.S. 73, 91 (1966).

challenges to a state's apportionment presented justiciable controversies under the Equal Protection Clause. At issue in *Baker* was Tennessee's 1901 apportionment statute. At the time, Tennessee's Constitution required apportionment based on "qualified voters" but actually apportioned based on persons 21 years of age or older. *Id.* at 192. The Court specifically noted the disparity between Tennessee's "population" and its eligible voters. *Id.* ("In 1901 the population was 2,020,616, of whom 487,380 were eligible to vote. The 1960 Federal Census reports the State's population at 3,567,089, of whom 2,092,891 are eligible to vote.").[5]

Just three years later, in *Burns v. Richardson*, the Court specifically held that states may choose among several acceptable apportionment bases, including total population. 384 U.S. 73, 92 (1966) ("the decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere"). This holding was based on the expressly stated understanding that various metrics would yield differing results:

> For example, on a total population basis, Oahu's ninth and tenth representative

---

[5] In reliance on *Baker* and *Reynolds*, Tennessee changed its Constitution to require apportionment by total population in 1966. TENN. CONST. art. II, § 4 (Amendment adopted in Convention Dec. 9, 1965, approved at election Nov. 8, 1966, and proclaimed by Governor Dec. 2, 1966).

> districts would be entitled to 11 representatives, and the fifteenth and sixteenth representative districts would be entitled to eight. On a registered voter basis, however, the ninth and tenth districts claim only six representatives and the fifteenth and sixteenth districts are entitled to 10.

Id. at 90–91.

And finally, ten years after *Reynolds*, in *Gaffney v. Cummings*, the Court reiterated its awareness that substantial deviations in voting eligible population may occur across districts when total population is used as an apportionment base, yet it continued to endorse total population as a constitutionally permitted method of equalization for the purposes of a one-person, one-vote analysis. The Court explained: "[t]he proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States." *Gaffney v. Cummings*, 412 U.S. 735, 746–47 (1973).[6] The Court, however, did not find that

---

[6] This Court later recognized that equalizing total population among districts does not necessarily equalize the districts based upon other population measures. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 771–72 (1983) (White, J. Dissenting) (noting that "[s]econd, far larger differences among districts are introduced because a substantial percentage of the total population is too young to register or is disqualified by alienage" and arguing that "[a]ccepting that the census, and the districting plans which are based upon it, cannot be perfect represents no backsliding in our commitment to assuring fair and equal representation in the election of Congress"), *aff'd*, 467 U.S. 1222 (1984).

such deviations in any way reduced the fairness or constitutionality of total population as a method of apportionment. *Gaffney* rejected that argument in a holding that has remained undisturbed for forty years.

In the fifty years since *Reynolds*, rulings from the courts of appeals have consistently applied this above set of unambiguous precedents. Every Court of Appeals that has addressed the issue has held that apportionment by total population is constitutional and protects the one-person, one-vote principle. Specifically, the Fourth, Fifth, and Ninth Circuits have all rejected challenges to the constitutionality of apportionment by total population. *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996) (rejecting argument that one-person, one-vote analysis must be based on voting-age population and relying on *Reynolds* and *Gaffney*); *Chen v. City of Houston*, 206 F.3d 502, 522 (5th Cir. 2000) (rejecting argument that Houston "improperly crafted its districts to equalize total population rather than [CVAP]"); *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 773–75 (9th Cir. 1990) (upholding use of total population as basis for district apportionment and finding that "[t]he framers were aware that this apportionment and representation base would include categories of persons who were ineligible to vote—women, children, bound servants, convicts, the insane, and,

at a later time, aliens") (internal citations omitted).[7]

Appellants do not cite a single case standing for the proposition that states *may not* use total population as their apportionment base. This Court's precedents on the issue are clear, and the use of total population apportionment remains unquestioned. The Courts of Appeals to have addressed this issue all agree, and forty-one of the fifty states follow this court-sanctioned approach. The ruling that Appellants seek would thus represent a seismic doctrinal shift. Yet as discussed below, Appellants have provided no justification for making this dramatic move and the Court should reject their invitation to transform the use of the total population metric from a bedrock compliance principle to a suspect and uncertain litigation risk.

---

[7] *See also*, *Brown v. US*, 486 F.2d 658, 661–62 (8th Cir. 1973)(noting that "[t]he Tribe's Constitution provides that apportionment may be based on either 'population' or 'qualified voters.' Use of either basis is permissible under the Supreme Court's decision in *Burns v. Richardson*"); *Clark v. Putnam Cnty.*, 293 F.3d 1261, 1263 n.6 (11th Cir. 2002) ("[i]deal population size of a district is the quotient of the population of a county divided by the number of its electoral districts").

B. Forty-one States Have Relied on the Well-Settled Principle that the Total Population Metric is Valid and Have Used it to Apportion Legislative Districts.

States have relied on *Reynolds* and the decisions applying it for over half a century. The number of states that have updated their redistricting laws and instituted the total population method since *Reynolds* illustrates the workability of the approach. To be sure, it is not the only approach. In the wake of *Reynolds*, *Gaffney*, and *Burns*, states have had the right to choose a redistricting method that worked best for them, provided the chosen method otherwise complied with applicable constitutional requirements. And forty states have done just that, changing their laws after *Reynolds* to adopt a new method of apportionment. In many instances, the states' reliance on this Court's precedents was explicit.[8] Thirty-three of those states adopted the

---

[8] *See, e.g.*, *Below v. Gardner*, 963 A.2d 785, 789 (N.H. 2002) ("In 1964, a resolution was introduced at the Constitutional Convention seeking to change the basis for senate apportionment from taxes to population. The matter came to the convention "[a]s a result of recent decisions by the United States Supreme Court") (citing Journal of Constitutional Convention); MICH. COMP. LAWS ANN. § 4.261 ("(d) Senate and house of representatives districts shall have a population not exceeding 105% and not less than 95% of the ideal district size for the senate or the house of representatives unless and until the United States Supreme Court establishes a different range of allowable population divergence for state legislative districts."); *Wilson v. Fallin*, 262 P.3d 741, 746 (Okla. 2011) ("As to section 9A, it is clear that the county-based apportionment formula is rendered a nullity by the basic

total population method, while only seven states adopted another method following this Court's holding in *Burns* that the Equal Protection Clause does not necessarily require total population to be used.

More than anything else, this history demonstrates reliance on the Court's decision in *Reynolds*. Moreover, of the forty-one states that now use total population as their apportionment base, thirty-two, including Texas, have mandated the use of the total population method in their respective constitutions. Four states have done so by statute. Four additional states have established the total population metric by case law, and one state has done so by means of its redistricting commission guidelines. In addition, it should be noted that, of the remaining nine states that do not allow for total population as a method for redistricting, a significant majority permit aliens to be counted. Four of the nine states exclude non-resident prisoners. Two states exclude non-resident military, and one of those states also excludes non-resident students. Only two states exclude aliens from their apportionment base.[9] Thus, forty-eight states use a method of calculation for redistricting that does *not* exclude aliens. The charts below list each state and the relevant law

---

constitutional standard that state legislative districts must be based on equality in the total population under the Equal Protection Clause of the Fourteenth Amendment and *Reynolds v. Sims*, 377 U.S. at 533, 84 S. Ct. at 1362, and its progeny.").

[9] In addition, Hawaii includes only permanent residents in districting.

associated with its redistricting method.

1.a States that have incorporated the total population metric in their constitution.

State	Constitutional Provision
Alabama	ALA. CONST. §§ 198, 200 (amended in 1901).
Alaska	ALASKA CONST. art. VI, §§ 3 & 6 (amended in 1998).
Arizona	ARIZ. CONST. art IV, Pt. 2 § 1 (amended in 2000).
Arkansas	ARK. CONST. art. VIII, §§ 2–3 (enacted in 1874 and amended in 1937).
Colorado	COLO. CONST. art. V, §§ 46–47 (enacted in 1967 and amended in 1975).
Florida	FLA. CONST. art. III, § 21 (amended in 2010).
Illinois	ILL. CONST. art. IV, § 3 (amended in 1970). 10 ILL. COMP. STAT. 91/5 (2011).
Indiana	IND. CONST. art. IV, § 5 (amended in 1984).
Iowa	IOWA CONST. art. III, § 34 (amended in 1968). IOWA CODE § 42.4(1)(a)(1980).
Kentucky	KY. CONST. § 33 (enacted in 1891).
Louisiana	LA. CONST. art. III, § 6 (enacted in 1974).
Massachusetts	MASS. CONST. pt. 2 art. CI (enacted in 1974).

State	Constitutional Provision
Minnesota	MINN. CONST. art. IV, § 2 (enacted in 1857).
Missouri	MO. CONST. art. III, §§ 2 & 5 (enacted in 1966).
Montana	MONT. CONST. art. V, § 14 (enacted in 1972). MONT. CODE ANN. § 5-1-115 (2003).
Nevada	NEV. CONST. art. IV, §§ 5 & 13 (amended in 1970).
New Hampshire[10]	N.H. CONST. Pt. 2, art. IX & XXVI (amended in 1964).
New Jersey	N.J. CONST. art. IV, § 2, ¶ 1 (enacted in 1995). *Id.* ¶ 3 (enacted in 1966).
North Carolina	N.C. CONST. art. II, §§ 3 & 5 (enacted in 1970).
Ohio	OHIO CONST. art. XI, §§ 2, 4, 9, & 11 (amended in 1967).
Oklahoma	OKLA. CONST. art. V, § 9A (enacted in 1964).

[10] New Hampshire's constitution permits non-resident military or student personnel to be excluded when redistricting. N.H. CONST. Pt. 2, art. IX.a. However, subsequent case law has interpreted that provision to require the use of the total population metric. *See Below*, 963 A.2d at 795 (holding that a legislative plan was flawed because "it d[id] not rest *entirely* upon the federal census data, as required by law")(emphasis added); *McGovern v. Sec'y of State*, 635 A.2d 498, 500 (N.H. 1993)(holding that the state constitution "established only one yardstick as a legislative guide in making an apportionment 'the last general census'" when considering a claim that art. IX.a should have been taken into account). For this reason, *amici*'s tally differs from the one offered by Appellees at App. Brief 28, n.8.

State	Constitutional Provision
Oregon	OR. CONST. art. IV, § 6 (amended in 1986). OR. REV. STAT. ANN. § 188.010 (West 1979).
Pennsylvania	PA. CONST. art. II, § 16–17 (enacted in 1968).
Rhode Island	R.I. CONST. art. VII, § 1 & art. VIII, § 1 (enacted in 1994).
South Carolina	S.C. CONST. art. III, §§ 3 & 6 (enacted in 1895).
South Dakota	S.D. CONST. art. III, § 5. (amended in 1982). S.D. CODIFIED LAWS § 2-2-41 (2011).
Tennessee	TENN. CONST. art. II, §§ 4 & 6 (amended in 1966).
Virginia	VA. CONST. art. II, § 6 (enacted in 1971). VA. CODE ANN. § 30-265 (2004).
West Virginia	W. VA. CONST. art. VI, §§ 4 & 7 (enacted in 1872).
Wisconsin	WIS. CONST. art. IV, § 3 (amended in 1982).
Wyoming	WYO. CONST. art. III, § 3 (enacted in 1889).

1.b States that have incorporated the total population metric through statute, regulation, or case law.

State	Relevant Law
Connecticut	CONN. CONST. art. III, § 5–6 (amended in 1980). Connecticut uses census data to equalize the districts on a total population basis. *See, e.g.*, *Miller v. Schaffer*, 320 A.2d 1, 8 (Conn. 1972).
Georgia	GA. CONST. art. III, § 2 (enacted in 1976). Georgia case law shows that "total population" based on U.S. Federal census data is the metric of apportionment. *See, e.g.*, *Toombs v. Fortson*, 241 F. Supp. 65, 70–71 (N.D. Ga. 1965), *aff'd*, 384 U.S. 210 (1966).
Idaho	IDAHO CODE ANN. § 72-1506 (West 2009).
Michigan	MICH. COMP. LAWS ANN. § 4.261 (1997).

State	Relevant Law
Mississippi	MISS. CONST. art. 13, § 254 (enacted in 1963 and amended in 1979). *Connor v. Johnson*, 330 F. Supp. 506, 507-08 (S.D. Miss. 1971) (using federal census data and interpreting reapportionment plans to require "*as nearly as possible*, equality in population among the several districts").
New Mexico	N.M. CONST. art. IV, § 3 (enacted in 1975). *Maestas v. Hall*, 274 P.3d 66, 72–73, 75 (N.M. 2012)(noting that legislative policy makes reference to using total population).
North Dakota	N.D. CENT. CODE § 54-03-01.5(5) (1975).
Utah	Utah has adopted state redistricting committee guidelines, which require that "districts must be as nearly equal as practicable" as determined by the federal census. OFFICE OF LEGISLATIVE RESEARCH & GEN. COUNSEL, REDISTRICTING COMM. REPORT, p. 3 (2001).
Vermont	VT. CODE ANN. § 1902–03. (1965).

2. States that use an alternative method.

State	Alternative Provision
California	CAL. CONST. art. XXI, § 2 (amended in 2010). CAL. ELEC. CODE § 21003 (West 2013) (excluding nonresident prisoners).
Delaware	DEL. CODE ANN. tit. 29, § 804. (1964). *Id.* § 804A (2010) (excluding nonresident prisoners).
Hawaii	HAW. CONST. art. IV, §§ 4 & 6 (enacted in 1959 and apportioning districts using permanent residents).
Kansas	KAN. CONST. art. X, § 1 (amended in 1988 and excluding non-resident military personnel and nonresident students attending college in the state).
Maine	ME. CONST. art. IV, Pt. 1, § 2 & Pt. 2, § 2 (enacted in 1986 and excluding not-naturalized foreigners).
Maryland	MD. CONST. art. III, §§ 4–5 (amended in 1970). MD. CODE ANN., ELEC. LAW § 8-701 (amended in 2010) (excluding nonresident prisoners).
Nebraska	NEB. CONST. art. III, § 5 (enacted in 1920 and excluding aliens).

State	Alternative Provision
New York	N.Y. CONST. art. III, §§ 4–5 (amended in 1970). N.Y. LEGIS. LAW § 83-m (McKinney 2010) (excluding nonresident prisoners).
Washington	WASH. CONST. art. II, § 43 (amended in 1983). WASH. REV CODE ANN. § 44.05.090 (West 1990) (excluding nonresident military personnel).

These state law provisions give life to this Court's pronouncement in *Reynolds* that "as nearly as is practicable one man's vote in [an] election is to be worth as much as another's."[11] As noted, thirty-three states actually changed their laws after *Reynolds* to require the use of the total population method, and seven wrote the "nearly as practicable" standard from *Reynolds* into their constitutions.[12] In addition, two states that have amended their constitutions after *Reynolds*, Iowa and Oregon, have incorporated the same standard into their state code. Also, North Dakota, which enacted the total population metric by statute after

---

[11] *Reynolds* drew this language from *Wesberry*, 376 U.S. at 7–8, in which this Court held that Georgia's federal congressional districts violated U.S. CONST. art I, § 2 because there were vast inequalities in the populations of the districts.
[12] Those seven states are Alaska, ALASKA CONST. art. VI, § 3 & § 6, Arizona, ARIZ. CONST. art IV, Pt. 2 § 1, Louisiana, LA. CONST. art. III, § 6, Montana, MONT. CONST. art. V, § 14, Pennsylvania, PA. CONST. art. II, § 16–17, South Dakota, S.D. CONST. art. III, § 5, and Virginia, VA. CONST. art. II, § 6.

the *Reynolds* decision, has incorporated the "nearly as practicable" standard into its state code. And, finally, Utah uses the same standard in its redistricting commission guidelines.

Thus, were the Court to overrule *Reynolds* and its progeny and hold that total population was an impermissible method by which to apportion districts, the vast majority of states would have to amend their constitutions or codes and, in some cases, both. Moreover, new methods of apportionment would need to go through the protracted process of constitutional amendment, legislative enactment, and judicial review, disrupting countless election cycles. In short, what is currently a workable standard would be wiped out, to be replaced with a massive rewriting campaign likely followed by years of litigation.

The states' reliance on *Reynolds* is exactly the kind of deeply entrenched reliance that the Court endeavors to respect when it refuses to depart from prior precedent. For example, in *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992), the Court was again persuaded to uphold *Roe v. Wade*, 410 U.S. 113 (1973), in part, because of "two decades of economic and social developments" that had developed in reliance on *Roe* and that affected personal relationships, women's economic and social roles, and women's ability to plan their futures. *Planned Parenthood*, 505 U.S. at 856. More recently, the Court has declined to overrule warnings established by *Miranda v. Arizona*, 384 U.S. 436 (1966), even while expressing some doubt about the

decision's reasoning. *Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("[w]hether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now"). The *Dickerson* Court noted that *Miranda* has "become embedded in routine police practice to the point where the warnings have become part of our national culture" and that reviving the law enforcement practice in place prior to *Miranda* would be "more difficult . . . for law enforcement officers to conform to, and for courts to apply in a consistent manner." *Id.* at 443–44. The states' reliance upon *Reynolds* and its progeny is no different and, in many ways, more compelling than the reliance interests the Court has acknowledged in the past, since the rationale of *Reynolds* has been approved time and again. Thus, because the rationale of *Reynolds* remains sound, the states' half century of reliance on it is all the more sufficient to uphold the decision.

Indeed, the use of total population for apportionment promotes fairness and is, in many instances, required by the Equal Protection Clause and Voting Rights Act. *See, e.g.*, *Garza*, 918 F.2d at 775 ("The purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure 'equal representation for equal numbers of people.'") (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 530 (1969)). Total population is the basis of apportionment that is "least manipulable" to political will and legislators should be responsible for "bringing resources" and benefits to "roughly the same number of persons." J. Fishkin,

Weightless Votes, 121 Yale L.J. 1888, 1906–07 (2012).

C. There Has Been No Change in Factual Circumstances that Would Justify Upending the States' Reliance Interest.

One of the additional factors the Court looks to in considering whether to overturn a prior precedent is whether there has been a change in the relevant underlying factual circumstances. For example, in *Patterson v. McLean*, the Court declined to reverse *Runyon v. McCrary*, 427 U.S. 160 (1976) (guaranteeing equal rights protection to contracts between private parties) because there had been no change in society's view on the acceptability of discrimination, its effects, or the necessity of legal protection against it. *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). And in *Bay Mills Indian Community*, the Court upheld tribal immunity from suit established in *Kiowa Tribe of Okla. v. Manuf. Techs., Inc.*, 523 U.S. 751 (1998), in part because the circumstances alleged to have been different—the increasing number of Native American casinos on non-Indian lands—was something the Court had been aware of previously and did not, in fact, constitute a difference. *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014).[13]

---

[13] Compare *Bay Mills* with *Brown v. Board of Ed. of Topeka, Shawnee Cnty, Kan.*, 347 U.S. 483 (1954), which acknowledged that new information about the psychological effects of segregation had surfaced, showing that separate facilities can never be equal.

In this instance, the use of the total population apportionment method is not premised on circumstances that did not exist, or that were unknown by the Court at the time *Reynolds* and *Burns* were decided. Rather, as has always been the case, significant non-citizen populations were also present, just as they are today.

1. There has been no change in factual circumstances because immigrants have historically clustered in metropolitan areas.

Historically, we have always largely been, and largely remain to this day, a "nation of immigrants,"[14] many of whom are not citizens and are not eligible to vote. Persons born in other countries have always made up a significant portion of the total population of the United States. *See generally* Grieco, Trevelyan, et al., *The Size, Place of Birth, and Geographic Distribution of the Foreign-Born Population in the United States: 1960 to 2010*, Population Division Working Paper No. 96, U.S. Census Bureau (2012) (showing that percentage of foreign-born population has increased only from 9.7% in 1850 to 11.1% in 2010, with fluctuations ranging from 4.7% to 11.1%).[15] Because immigrants have not been evenly distributed throughout each state, but have tended

---

[14] John F. Kennedy, Jr., *A Nation of Immigrants* (1964).

[15] The most pronounced difference in immigration statistics is not the percentage of immigrants in the total population, but rather, their origin. Formerly, most immigrants came from European countries; now, most come from Latin America. *See Historical Census Statistics*, Table 3.

to cluster in ports of entry and other large metropolitan areas, disparities between voting-eligible population and total population have existed since well before the concept of one-person, one-vote became the law of the land. United States census data shows that immigrants have lived disproportionately in metropolitan areas since at least the time of *Reynolds*. *See generally* Gibson and Jung, *Historical Census Statistics on the Foreign-Born Population of the United States: 1850 to 2000,* Population Division Working Paper No. 81, U.S. Census Bureau, (2006) (hereinafter *Historical Census Statistics*). Moreover, this has been true in each decade since 1960.

	Foreign-born population in metropolitan areas	Overall population in metropolitan areas
1960	83.8%	63.3%
1970	88.0%	69.0%
1980	91.8%	74.8%
1990	94.3%	77.5%
2000	94.4%	80.3%

Population patterns in the State of Texas follow this historic norm. For example, the foreign-born population percentage in Houston is currently 19.0%, as opposed to the overall foreign-born

population within Texas at 13.9%. In the earliest census data available, Houston had 16.7% foreign-born population in 1870, compared to Texas's 7.5% at the time. *See Historical Census Statistics*, Tables 14 and 26. The same holds true in other states. In 1870, New York City's foreign population was at 44.5%, compared to the state's overall foreign-born population of 26.0%. San Francisco in 1870 had a foreign population of 49.3%, while California overall had 37.5%. *Id.* This would suggest that districts with large metropolitan areas have frequently had higher percentages of non-eligible population. In sum, aliens have always been unevenly distributed in Texas and the other states since before *Reynolds* was decided. Because this has always been the case, that disparity does not justify rejecting established precedent because, in reality, there is no changed circumstance.

2. This Court has acknowledged the clustering effect of immigrants on apportionment in its previous decisions.

Nor did the Court fail to recognize these facts in its previous decisions. As discussed above, in *Baker*, for example, the Court noted the difference between Tennessee's "population" and eligible voters. *Baker*, 369 U.S. at 192 ("The 1960 Federal Census reports the State's population at 3,567,089, of whom 2,092,891 are eligible to vote."). Yet, neither the *Baker* Court nor the *Reynolds* Court took this information to mean that total population might be an improper basis for apportionment or

that it contravenes the one-person, one-vote doctrine.

Gaffney further recognized that "'census persons' are not voters." *Gaffney*, 412 U.S. at 746–47. In addition, the Court noted that the "proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States . . . [a]nd these figures tell us nothing of the other ineligibles making up the substantially equal census populations among election districts: aliens, nonresident military personnel, nonresident students, for example." *Id.* Yet the Court was untroubled by these variations when it held that there was "no constitutionally founded reason to interfere" with using total population for apportionment. *Id.* at 746 n.12 (citing *Burns*, 384 U.S. at 92). Nowhere in *Gaffney* did the Court even suggest that these potential deviations might render the total population metric unconstitutional.

Similarly, the Court in *Gaffney* noted that such deviations may be especially significant in metropolitan areas or immigration-heavy states: "New York has a 29% variation in age-eligible voters among congressional districts, while California has a 25% and Illinois a 20% variation." *Id.* at 747 n.13. Significantly, the comparative deviations in age-eligibility that this Court found acceptable in *Gaffney* are substantially similar to those Appellants complain of here. Appellants contend there is at least a 30.8% deviation in the Texas plan between CVAP and total population,

and that this deviation constituted a facially invalid apportionment method. But if that were so, then the same would also apply to the disparity accepted in *Gaffney*. Yet the Court has properly taken a different path. In *Reynolds*, the Court held that redistricting measures must be based on "substantial equality of population." 377 U.S. at 559. In *Burns*, the Court determined that states' decisions to include "aliens, transients, [or] short-term or temporary residents" are independent choices with which there was "no constitutionally founded reason to interfere." 384 U.S. at 92. And in *Gaffney*, the Court recognized—and expressed no concern about—substantial deviations between total population and voter-eligibility. In *Gaffney*, deviations as large as 29% did not warrant condemnation. On this basis, there is no reason why Appellants' allegation of a 30.8% deviation now should prompt a different response. Appl. Br. at 49.

D. Mandating CVAP Would Inevitably Increase Judicial Involvement in State Legislative Apportionment.

1. This Court has repeatedly found judicial manageability to be an important criterion in determining whether to depart from previous precedent.

Appellants urge the Court to upend long-standing, reliable precedent in favor of a less judicially manageable test guaranteed to breed litigation challenges. This is not the first time this

Court has been faced with such a choice. Time and again the Court has considered judicial manageability in its *stare decisis* analysis, and time and again the Court has given judicial manageability significant weight.

Most recently, in *Kimble*, the Court refused to adopt the "elaborate inquiry" recommended by the plaintiff, even after acknowledging its potential merit. 135 S. Ct. at 2411. Instead, the Court, adhering to the principles of *stare decisis*, stood by its prior decision in *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), not only because the Court found no change of circumstances worthy of the proposed abandonment, but importantly because the Court recognized that *Brulotte*'s holding presented a judicially manageable option. In *Kimble*, the plaintiff alleged that the defendant had improperly stopped making contracted-for-payments to use the plaintiff's patent after the patent had expired. The plaintiff urged the Court to abandon *Brulotte*, its prior precedent rejecting enforcement of post-expiration royalty clauses and, instead, to adopt a flexible, "rule of reason" analysis.

In rejecting this request, the *Kimble* Court explained that its prior holding was "simplicity itself to apply." 135 S. Ct. at 2411. In contrast, the plaintiff's proposed alternative involved an "elaborate inquiry" "which c[ould] produce high litigation costs and unpredictable results." *Id.* at 2404. The Court held that "trading in *Brulotte* for the rule of reason would make the law less, not more, workable than it is now," and that in such instances, "the case for sticking with long-settled

precedent grows stronger." *Kimble*, 135 S. Ct. at 2411. *Compare West Coast Hotel, Co. v. Parrish*, 300 U.S. 379 (1937) (reversing prior decision invalidating a minimum wage law, finding Court's prior decision to be inconsistent with subsequent and prior holdings). Here, the same concern about judicial manageability supports continued adherence to total population apportionment.

2. Total population is the established, judicially manageable metric for redistricting.

Perhaps one of the most compelling reasons for adhering to the status quo is that the statistical information necessary to apply it is readily available. Full-count decennial census data are universally available and yield consistent and predictable results based upon an "enumeration" of the population. Every ten years, the Federal Census Bureau, operating under Title 13 and Title 26 of the U.S. Code, tabulates this country's population. Specific information is provided for every state—allowing state legislators to obtain information easily and reliably, from a single comprehensive source. Unsurprisingly, it is the method mandated by the Constitution for apportioning Congressional districts. U.S. CONST. art. I, § 2, cl. 3; U.S. CONST. amend. XIV.

In contrast, Appellants' proposed use of sampling data in the redistricting context would force courts to engage in highly technical analyses over which sampling protocols are most appropriate in calculating the CVAP distributions. Unlike total

population Census data, which is based on an actual count of total population, CVAP is always determined by means of statistical sampling.[16] *See* Jorge Chapa, et al., *Redistricting: Estimating Citizen Voting Age Population*, The Chief Justice Earl Warren Institute On Law and Social Policy, Research Brief, September 2011, at 2–4. Unquestionably, a CVAP metric would invite judicial challenge over the methodology used to determine CVAP, including lengthy expert submissions regarding sampling errors and statistical significance. Courts would unnecessarily be forced to resolve these difficult and technical disputes.

Reflecting its ease of use, forty-one state constitutions and statutes expressly call for use of the U.S. federal decennial census data and require new redistricting plans to be made on the U.S. Federal Decennial Census timeline. Today, the Census does not contain CVAP data. If this Court were to adopt CVAP as the appropriate population metric, it would be mandating these states to amend their respective Constitutions or nullify their respective statutes to not only apply a new districting metric but to use new and unfamiliar

---

[16] As of 2010, the U.S. Federal Decennial Census no longer includes information about the number of non-citizens inhabiting the country at large or the number of those inhabiting any of the specific states or census tracts. Moreover, this Court held "that the Census Act prohibits the use of sampling for apportionment purposes." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 342 (1999).

data sources. This factor also counsels against the use of Appellants' preferred standard.

3. Appellants' proposed standard is otherwise highly problematic.

In contrast with the total population metric, the eligible voter standard that Appellants propose has countless problems, not the least of which is its sheer complexity.

Appellants make only conclusory assertions that their eligible voter standard is workable, judicially manageable, and readily usable. Critically, Appellants did not present a proposed plan to the district court, nor did they state the specific standard they seek to employ. Should the Court accept Appellants' claim, numerous technical difficulties will bedevil the states and their political subdivisions.

To begin with, there are several significant potential biases inherent in Appellants' proposed approach. To the extent Appellants reference voter registration as a possible proxy for the voter-eligible population, the biases inherent in using voter registration as an apportionment means have led it to be treated as suspect, at best, for that purpose. See *Burns*, 384 U.S. at 96 (1966) (noting "hazards" of apportionment by voter registration).

Further, Appellants' proposed use of CVAP also carries embedded biases because it has a strong correlation with racial and ethnic minority populations. *See supra* C.1. Appellants'

alternative could, in effect, force the redistribution of Latino population using districting artifices that on their face would be difficult to distinguish from the unconstitutional gerrymandering in *Bush v. Vera*, 517 U.S. 952 (1996).

Redistricting based on CVAP also has the distinct capability to dilute Latino voting strength. *See, e.g., Garza*, 918 F.2d at 774–75 (noting that "the *Reynolds* Court recognized that the people, including those who are ineligible to vote, form the basis for representative government" and finding that "basing districts on voting population rather than total population would disproportionately affect these rights for people living in the Hispanic district"). For this reason alone, it is not a viable alternative to the use of total population.

II. THE APPLICABILITY OF THE POLITICAL QUESTION DOCTRINE IS NOT PRESENTED IN THIS APPEAL.

Appellants' "Question Presented" states in part that "[t]he district court held that Appellants' constitutional challenge is a judicially unreviewable political question." App. Brief at i. Appellants similarly argue elsewhere that the district court found their claim to be "non-justiciable" under the political question doctrine.[17] These assertions are simply incorrect.

---

[17] *See also* App. Brief at 30 ("The notion that a State's choice of an apportionment base is an unreviewable political question cannot be squared with this Court's one-person, one-vote decisions.").

The district court's judgment rested upon routine Equal Protection analysis and cannot reasonably be read to have relied upon the political question doctrine. The district court correctly dismissed Appellants' claim because the law is clear: There is no constitutional right to have electoral districts equalized on a particular metric of population. Nor is the political question doctrine otherwise implicated in this case.

A. There is No Basis in the Language of the District Court's Decision to Conclude that It Invoked the Political Question Doctrine.

The district court's decision did not mention the political question doctrine by name, nor did it use the terms "justiciable" or "non-justiciable" with respect to Appellants' Equal Protection Claim. Moreover, the district court's stated rationale for dismissing Appellants' claim on the merits was their failure to state a claim upon which relief can be granted, under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). The district court's identification of Rule 12(b)(6) as the basis for dismissal leaves little doubt that it did not apply the political question doctrine. Had the district court actually concluded that the case was non-justiciable under the political question doctrine, it almost certainly would have ruled that it lacked subject matter jurisdiction and dismissed Appellants' claim under Federal Rule of Civil Procedure 12(b)(1), rather than reaching the merits of Appellants' claim under Rule 12(b)(6).

The district court explained that its decision was based on this Court's rejection of Appellants' theory that "the metric of apportionment employed by Texas [total population] results in an unconstitutional apportionment because it does not achieve equality as measured by Plaintiffs' chosen metric—voter population." *Evenwel v. Perry*, No. A–14–CV–335–LY–CH-MHS, 2014 WL 5780507, at *3 (W.D. Tex. Nov. 5, 2014). The district court expressly followed the reasoning in *Burns*, noting that "a state's choice of apportionment base is not restrained beyond the requirement that it not involve an unconstitutional inclusion or exclusion of a protected group." *Evenwel*, 2014 WL 5780507, at *3. (quoting *Burns*, 384 U.S. at 92).

Thus, the district court's decision and analysis were consistent with *Burns*, which did not employ the political question doctrine when it ruled that a state's choice of apportionment base is an issue best left to the states. The district court specifically noted that a state's choice of apportionment base "'involves choices about the nature of representation' with which [the Court has] 'been shown no constitutionally founded reason to interfere.'" *Evenwel*, 2014 WL 5780507, at *4 (quoting *Burns*, 384 U.S. at 92). As a result, the court concluded that Appellants were asking the court "to 'interfere' with a choice that the Supreme Court has unambiguously left to the states." *Evenwel*, 2014 WL 5780507, at *4.

B. Regardless of the District Court's Rationale, the Political Question Doctrine is Not Implicated.

Burns left the choice of an apportionment base to the states due to longstanding federalism principles, and *Burns*, by itself, neither directly nor indirectly reflects the political question doctrine. This Court has repeatedly admonished lower courts to leave redistricting choices to the states, except where intervention is required to protect a federal interest. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37 (1982) (holding that a court must defer to legislative judgments on reapportionment as much as possible); *Growe v. Emison* 507 U.S. 25 (1993) (holding failure to defer to state court's timely efforts to redraw legislative and congressional districts an error); *Perry v. Perez*, 132 S. Ct. 934, 944 (2012) ("The District Court also appears to have unnecessarily ignored the State's plans in drawing certain individual districts."). The choice of apportionment base at issue here is no different in this regard than other redistricting choices left to the states in the first instance.

Furthermore, it is questionable whether the political question doctrine has any remaining vitality with respect to federal/state allocation of powers, including the conduct of state elections.[18] Since *Baker*, the Court has, on several occasions,

---

[18] This Court's decisions invoking the political question doctrine in disputes concerning the coordinate branches of the federal government, which comprise the vast bulk of political question cases, are not relevant here.

specifically rejected the applicability of the political question doctrine to cases involving federal constitutional claims against state election practices. *See Vieth v. Jubelirer*, 541 U.S. 267 (2004) (while four Justices would have held that the issue of political gerrymandering was a non-justiciable political question, the view did not command a majority of the Court.); *Davis v. Bandemer*, 478 U.S. 109, 110 (1986) (rejecting the application of the political question doctrine: "Disposition of the case does not involve this Court in a matter more properly decided by a coequal branch of the Government"). Thus, the political question doctrine is not a barrier to reaching the merits of whether the Equal Protection Clause constrains the states' choice of apportionment base for redistricting.

Appellants' claim should be rejected because they offer "no constitutionally founded reason to interfere." *Burns*, 384 U.S. at 92. And based on this Court's sound precedents, it is clear that the judgment of the district court should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

G. Eric Brunstad, Jr.
Counsel of Record
DECHERT LLP
90 State House Square
Hartford, Connecticut 06103
(860) 524-3999
eric.brunstad@dechert.com

Linda C. Goldstein
Neil A. Steiner
Rachel B. Swartz
Cara Schmidt
Mari C. Stonebraker
Diana C. Wang
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036

Jon M. Greenbaum
Robert A. Kengle
Ezra D. Rosenberg
M. Eileen O'Connor
Dorian Spence
LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW
1401 New York Avenue, NW
Suite 400
Washington, DC 20005

Counsel to Amicus Curiae

September 25, 2015

No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al*, Appellants,

v.

GREG ABBOTT, GOVERNOR OF TEXAS, *et al.*, Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

WADE J. HENDERSON
LISA M. BORNSTEIN
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS
1629 K St., N.W., 10th Floor
Washington, DC 20006
(202) 466-3311

MATTHEW M. HOFFMAN
Counsel of Record
ANDREW KIM
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
mhoffman@goodwinprocter.com
(202) 346-4000

Counsel for Amici Curiae
(Additional counsel listed on inside cover)

Penda D. Hair
Katherine Culliton-González
ADVANCEMENT PROJECT
1220 L Street, N.W., Suite 850
Washington, D.C. 20005
(202) 728-9557

Terry Ao Minnis
Eugene Chay
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Avenue, NW, Suite 1200
Washington, DC 20036
(202) 296-2300

Margaret Fung
Jerry Vattamala
ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
99 Hudson Street, 12th Floor
New York, NY 10013
(212) 966-5932

Juan Cartagena
Joanna Elise Cuevas Ingram
Martha Pardo
LATINOJUSTICE PRLDEF
99 Hudson Street, 14th Floor
New York, NY 10013
(212) 219-3360

Erin Hustings
NALEO EDUCATIONAL FUND
600 Pennsylvania Ave. SE, Suite 230
Washington, DC 20003
(202) 546-2536

Nicholas Espiritu
Alvaro M. Huerta
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
(213) 639-3900

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. Total Population Is the Most Appropriate Basis for Redistricting, and Is Consistent With the Constitution, Longstanding Practice, and Decisions of This Court. 6

II. Registered Voters and Actual Voters Are Not a Reliable or Appropriate Basis for Redistricting Because of Barriers to Registration and Voting That Disproportionately Affect People of Color, Youth, the Poor, and People With Disabilities. 11

III. Assuming That CVAP Is a Constitutionally Permissible Basis for Redistricting, States Can Reasonably Find That Total Population Is Fairer and More Appropriate. 24

CONCLUSION 30

APPENDICES

Appendix A: The Leadership Conference on Civil and Human Rights Participating Member Organizations

Appendix B: *Amici Curiae* Joining as Individual Signatories

Appendix C: Racial and Ethnic Demographic Data Relating to Voting Age and Citizenship Based on U.S. Census American Community Survey Estimates

TABLE OF AUTHORITIES

CASES **Page(s)**

Arcia v. Fla. Sec'y of State,
772 F.3d 1335 (11th Cir. 2014) 16

Bd. of Estimate of City of N.Y. v. Morris,
489 U.S. 688 (1989) 9

Brown v. Thompson,
462 U.S. 835 (1983) 9

Burns v. Richardson,
384 U.S. 73 (1966) ..... *passim*

Chapman v. Meier,
420 U.S. 1 (1975) 9

Connor v. Finch,
431 U.S. 407 (1977) 9

Disabled in Action v. Bd. of Elections,
752 F.3d 189 (2d Cir. 2014) 22

Gaffney v. Cummings,
412 U.S. 735 (1973) 9

Hunter v. Underwood,
471 U.S. 222 (1985) 17

Karcher v. Daggett,
462 U.S. 725 (1983) 9

Kirkpatrick v. Preisler,
394 U.S. 526 (1969) 9, 10

League of Women Voters of N.C. v. North Carolina,
769 F.3d 224 (4th Cir. 2014) 19

Mahan v. Howell,
410 U.S. 315 (1973) 9

Miller v. Blackwell,
348 F. Supp. 2d 916 (S.D. Ohio 2004) 16

Mont. Democratic Party v. Eaton,
581 F. Supp. 2d 1077 (D. Mont. 2008) 16

Ohio State Conf. of NAACP v. Husted,
768 F.3d 524 (6th Cir.), *vacated*, No. 14-193877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014) 19

Plyler v. Doe,
457 U.S. 202 (1982) 24

Reynolds v. Sims,
377 U.S. 533 (1964) 2, 4, 8

Swann v. Adams,
385 U.S. 440 (1967) 9

Thornburg v. Gingles,
478 U.S. 30 (1986) 6

United States v. Berks Cnty.,
250 F. Supp. 2d 525 (E.D. Pa. 2003) 21

Veasey v. Abbott,
796 F.3d 487 (5th Cir. 2015) 19

Veasey v. Perry,
71 F. Supp.3d 627, 633 (S.D. Tex. 2014) 18

Wesberry v. Sanders,
376 U.S. 1 (1964) 8

White v. Regester,
412 U.S. 755 (1973) 9

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 2 7

U.S. Const. amend. XIV, § 2 7

STATUTES AND LEGISLATIVE MATERIALS

8 U.S.C. § 1423 27

8 U.S.C. § 1427 27

8 U.S.C. § 1446 28

National Voter Registration Act,
52 U.S.C. §§ 20501 *et seq.* 16

Voting Rights Act,
52 U.S.C. §§ 10301 *et seq.* 6

H.R. Rep. No. 102-655 (1992), *reprinted in*
1992 U.S.C.C.A.N. 772 19

OTHER AUTHORITIES

8 C.F.R. § 312.2 28

The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration (Jan. 2014) ..... *passim*

Asian Americans Advancing Justice, *Voices of Democracy: Asian Americans and Language Access During the 2012 Elections* (Aug. 2013) 20

Asian American Justice Center, *Behind the Numbers: Post-Election Survey of Asian American and Pacific Islander Voters in 2012* (Apr. 2013) 20

Asian American Legal Defense and Education Fund, *Asian American Access to Democracy in the 2014 Elections* (Aug. 6, 2015) 20

Bryan Baker & Nancy Rytina, Office of Immigration Statistics, Dep't of Homeland Sec., *Estimates of the Lawful Permanent Resident Population in the United States: January 2013* (Sept. 2014) 27

Christopher Famighetti et al., Brennan Center for Justice, *Election Day Long Lines: Resource Allocation* (2014) 23

Thom File, U.S. Census Bureau, *The Diversifying Electorate—Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections)* (May 2013) 12, 13

Thom File, U.S. Census Bureau, *Who Votes? Congressional Elections and the American Electorate: 1978-2014* (July 2014) 12, 13

Matthew Gardner et al., Institute on Taxation and Economic Policy, *Undocumented Immigrants' State and Local Tax Contributions* (Apr. 2015) 29

Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify As LGBT*, Gallup (Oct. 18, 2012) 14

Jody L. Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2014 General Election* (Sept. 2014) 19

Michael C. Herron & Daniel A. Smith, *Congestion at the Polls: A Study of Florida Precincts in the 2012 General Election* 1 n.5 (June 24, 2013) 23

Immigration Policy Center, American Immigration Council, *Strength In Diversity: The Economic and Political Clout of Immigrants, Latinos, and Asians in the United States* (Jan. 2012) 29

Alexander Keysser, *The Right to Vote: The Contested History of Democracy in the United States* (2000) 17

Susan Mizner & Eric Smith, American Civil Liberties Union, *Access Denied* (Jan. 2015) 17

Jeffrey S. Passel et al., *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14* (Pew Research Center 2014) 29

Myrna Perez, Brennan Center for Justice, *Voter Purges* (2008) 16

Camille Ryan, U.S. Census Bureau, *Language Use in the United States: 2011* 19, 20

Lisa Schur, *Reducing Obstacles To Voting for People With Disabilities*, White Paper for the Presidential Commission on Election Administration (June 22, 2013) 14, 22

Paul Taylor et al., Pew Hispanic Center, *An Awakened Giant: The Hispanic Electorate is Likely to Double by 2030* (Nov. 14, 2012) 28

Christopher Uggen et al., The Sentencing Project, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010* (July 2012) 18

U.S. Bureau of Labor Statistics, *Foreign-Born Workers: Labor Force Characteristics—2014* (May 21, 2015) 29

U.S. Census Bureau, *Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and the States: April 1, 2010 to July 1, 2014* 26

U.S. Census Bureau, Voting and Registration in the Election of November 2014—Detailed Tables 12, 13

U.S. Citizenship and Immigration Servs., Dep't of Homeland Sec., Form G-1055 (Dec. 18, 2014) 28

INTEREST OF *AMICI CURIAE*

The Leadership Conference on Civil and Human Rights ("The Leadership Conference") is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States.[1] It is the nation's oldest, largest, and most diverse civil and human rights coalition. The Leadership Conference was founded in 1950 by three legendary leaders of the civil rights movement—A. Philip Randolph of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson of the National Jewish Community Relations Advisory Council. Its member organizations represent people of all races, ethnicities, and sexual orientations. The Leadership Conference works to build an America that is inclusive and as good as its ideals, and it believes that every person in the United States deserves to be free from discrimination based on race, ethnicity, gender, or sexual orientation.

The Leadership Conference Education Fund ("The Education Fund") is the research, education, and communications arm of The Leadership Conference. It focuses on documenting discrimination in American society, monitoring efforts to enforce civil rights legislation, and fostering better understanding of issues of prejudice.

---

[1] The parties' blanket consents to the filing of *amici curiae* briefs are on file with the Clerk. No counsel for a party authored any part of this brief; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici curiae* or their counsel made a monetary contribution to the brief's preparation or submission.

A list of The Leadership Conference's members is set forth in Appendix A. Several organizations also join as individual signatories to this brief. Those organizations are identified and their interests are set forth in Appendix B.

SUMMARY OF ARGUMENT

The State of Texas complied with the Equal Protection Clause of the Fourteenth Amendment when it drew state legislative districts that were approximately equal in total population. In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people." *Id.* at 560-61. Based on that principle, *Reynolds* held that the Equal Protection Clause requires a state to make a good faith effort to draw districts "as nearly of equal population as is practicable." *Id.* at 577. In keeping with the principle of equal representation for equal numbers of people, *Reynolds* focused on disparities in total population as measured by the most recent decennial census. Subsequent cases from this Court have continued to focus on total population as the touchstone for assessing compliance with *Reynolds*, and for more than fifty years, state and local governments have overwhelmingly attempted to draw district lines so as to equalize total population.

Largely ignoring this history, appellants now argue that *Reynolds* should be reinterpreted to require states to equalize some other metric, such as registered voters, "non-suspense" registered voters, or citizen voting age population ("CVAP"). The Court should reject these arguments and reaffirm that a redistricting plan satisfies the Equal Protection

Clause's "one person, one vote" requirement if districts are approximately equal in total population.

In Part I below, we show that, absent extraordinary circumstances, total population is the proper basis to use for redistricting because it ensures that all people—not merely those who are eligible to vote or who actually cast ballots—are represented in the political process. At any given point in time, there are significant groups of people residing in the United States who are not legally eligible to vote. The largest groups are children under the age of 18 and noncitizen immigrants, including many who are not yet eligible for naturalization but will eventually become eligible, others who do not seek naturalization, and many others who desire to become citizens but are deterred from doing so by the complexities and cost of the naturalization process. These populations are fluid; between decennial census counts, many people under the age of 18 will attain voting age, and many noncitizens will be naturalized. Many other people are legally eligible to vote, but face significant legal and practical barriers to registration and exercise of the franchise. Yet all of these individuals have a deep stake in the workings of government; elected officials create laws and policies that govern the total population within their jurisdictions. Indeed, government actions and policies will affect their most basic and fundamental rights. The fact that people cannot or do not actually vote does not mean that they are not entitled to representation in the political process in accordance with their numbers.

Contrary to appellants' assertions, a total population standard for redistricting is consistent with the Fourteenth Amendment, which explicitly incorporates the principle of equal representation for equal

numbers of people. It is also consistent with longstanding practice and legal precedent in the United States, including *Reynolds* and numerous subsequent decisions of this Court that have continued to focus solely on whether there are unacceptable disparities in total population. The Court has never suggested that a districting plan that substantially equalizes the total number of persons from one district to the next—like the Texas plan at issue here—is constitutionally infirm if it fails to equalize the number of registered voters, CVAP, or any metric other than total population. Even if states are permitted, under some circumstances, to utilize other metrics, they certainly are not required to do so.

In Part II, we show that registered voters and actual voters are not a reliable or appropriate basis for redistricting, whether for purposes of drawing Congressional districts, state legislative districts, or districts for local government bodies. As this Court recognized in *Burns v. Richardson*, 384 U.S. 73 (1966), registered and actual voters may vary wildly from one election to the next, are subject to political manipulation, and use of these numbers as a basis for redistricting may perpetuate the effects of existing discriminatory practices. *See id.* at 91-93. Although these are all valid concerns, we focus primarily on the discriminatory impact of a registered or actual voter standard.

There are many legal and practical barriers to registration and voting in the United States, and these barriers tend to have a disproportionate impact on racial and ethnic minorities, younger voters, the poor, and people with disabilities. As a result, registration and voting rates are consistently lower for these groups than for the population at large. Chang-

ing from a total population standard to a registered voter or actual voter standard would reinforce and exacerbate existing exclusionary and potentially discriminatory barriers to registration and voting and shift political participation and power away from groups that are already disadvantaged in the political process.

In Part III, we show why using CVAP as the basis for redistricting is also deeply problematic. In particular, switching from a total population standard to a CVAP standard would disproportionately exclude racial and ethnic minorities from the population base. Thus on balance, use of CVAP as a basis for redistricting would have a discriminatory impact on historically disenfranchised minority and immigrant communities, depriving them of the right to be adequately represented and the political power to which they would be entitled if fully counted as whole persons in the population base.

There are two reasons for the disparities between total population and CVAP. First, minority communities are on average significantly younger than the population at large, meaning that a higher percentage of these communities are under the age of 18. The overwhelming majority of people under 18 are citizens who will eventually be able to vote, and states can legitimately decide that they should be included in the population base. Second, some minority groups, such as Latinos and Asian Americans, contain relatively large numbers of noncitizens. Notably, many of these people are eligible to become U.S. citizens, and many more will become eligible upon satisfying the five-year residency requirement. In many cases, however, individuals seeking to naturalize are deterred by institutional barriers which include the

cost and complexity of the naturalization process. In any case, whether or not noncitizens plan to seek naturalization or are eligible to do so, they are an integral part of American society and equally subject to the laws that apply to citizens. States may reasonably conclude that they should be represented in the political process.

ARGUMENT

I. Total Population Is the Most Appropriate Basis for Redistricting, and Is Consistent With the Constitution, Longstanding Practice, and Decisions of This Court.

Absent extraordinary circumstances, total population is the proper basis to use for redistricting because it assures that all people in a given community are represented in its government.[2] Many people are legally ineligible to vote, including children, immigrants who have not yet been naturalized, and in some states, people who have been convicted of a felony or deemed mentally incompetent. Many others are theoretically eligible to vote, but face legal and

---

[2] In this brief, we focus solely on the proper metric to use for ensuring compliance with the equal population requirement set forth in *Reynolds*. Other metrics, such as CVAP, may be appropriate for other purposes, such as whether a particular districting scheme dilutes minority voting strength in violation of section 2 of the Voting Rights Act, 52 U.S.C. § 10301. That is because the § 2 inquiry does not address population equality, but rather turns in part on whether minority voters are sufficiently numerous to enable them to elect candidates of their choice. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986). Thus, the inquiry into CVAP data in potential districts under section 2 of the Voting Rights Act relates to predictions of remediability—whether electoral outcomes might change as to ameliorate the harms of vote dilution.

practical barriers to the exercise of that right. But the fact that certain people cannot or do not vote should not mean that they and their families forfeit all rights to representation in the political system.

In our democracy, elected officials do not simply represent the people who voted for them, or the people who are eligible to vote. They are expected to, and do, represent the interests of all of the people who live in their respective districts. After all, those who cannot or do not vote are still impacted by government in a wide variety of ways. They attend public schools and universities, walk or drive along public streets, and utilize a wide variety of other government services and benefits. They pay taxes and are required to comply with the same laws that apply to voters. In short, they are important members of society, and should be entitled to representation in government according to their numbers.

Appellants argue that the Fourteenth Amendment somehow precludes states from using total population as the basis for redistricting and requires states instead to equalize some other metric (such as registered voters or CVAP). This assertion is, at the very least, contrary in spirit to section 2 of the Fourteenth Amendment, which provides that Representatives in Congress "shall be apportioned among the states according to their respective numbers, counting the ***whole number of persons*** in each State." U.S. Const. amend XIV, § 2 (emphasis added).[3] This con-

---

[3] Section 2 of the Fourteenth Amendment superseded the portion of Article I, Section 2, which based apportionment on the "whole Number of free Persons" in each state, plus "three fifths of all other Persons," *i.e.*, slaves. U.S. Const. art. I, § 2. But even though slaves were not counted as full people under this stand-

stitutional provision reflects the principle that all "persons" in a State—whether or not they can or do vote—are entitled to representation in Congress. It cannot be that the same Fourteenth Amendment that requires Representatives to be apportioned among the States based on total population somehow forbids use of total population for redistricting within the States.

Appellants' contorted reading of the Fourteenth Amendment finds no support either in historical practice or the decisions of this Court. This Court recognized in *Wesberry v. Sanders*, 376 U.S. 1 (1964), that the requirement that Representatives be apportioned among the states "according to their respective numbers" also mandated that Congressional districts have equal numbers of people. *Reynolds* extended that principle to state and local government bodies, holding that "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people." 377 U.S. at 560-61.[4] Based on that principle, *Reynolds* held that the Equal Protection Clause requires a state to make a good faith effort to draw districts "as nearly of equal population as is practicable." *Id.* at 577. The Court expressly focused on disparities in total population. *See id.* at 545, 547, 549-50, 569.

---

ard, the apportionment was based on a count of all persons resident within a state, including those not eligible to vote.

[4] *See also Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (concluding after review of Constitutional Convention proceedings that "our Constitution's plain objective" was to "mak[e] equal representation for equal numbers of people the fundamental goal for the House of Representatives").

Since *Reynolds*, the Court has developed and consistently applied a framework for deciding "one person, one vote" cases, which likewise focuses on disparities in total population. The framework focuses on the maximum deviation from "ideal" district size—*i.e.*, the total population divided by the number of seats. For state and local government bodies, a maximum population deviation of up to 10% is generally acceptable; larger deviations create a *prima facie* case of discrimination that must be justified by the state.[5] Congressional districts are held to a stricter standard, which requires states to achieve population equality "as nearly as is practicable."[6] Under either standard, however, the touchstone is equality of total population.

The one case in which the Court has seemed to countenance a departure from a total population standard is *Burns v. Richardson*, 384 U.S. 73 (1966). That case, however, involved special and unusual circumstances. In the immediate wake of *Reynolds*, Hawaii was required to reapportion its state senate to comply with the equal population requirement, and adopted an interim redistricting plan for the 1966 election. Hawaii had "special population problems" *id.* at 94, due to the fact that there was a large

---

[5] *See, e.g., Brown v. Thompson*, 462 U.S. 835, 842-43 (1983). For other cases applying these standards based on total population see *Bd. of Estimate of City of N.Y. v. Morris*, 489 U.S. 688, 700-01 & n.7 (1989); *Connor v. Finch*, 431 U.S. 407, 416-18 & n.13 (1977); *Chapman v. Meier*, 420 U.S. 1, 21-26 (1975); *Mahan v. Howell*, 410 U.S. 315, 319-30 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973); *White v. Regester*, 412 U.S. 755, 761 (1973); *Swann v. Adams*, 385 U.S. 440, 442-46 (1967).

[6] *See Karcher v. Daggett*, 462 U.S. 725, 730 (1983); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969).

and fluctuating population of military personnel and tourists concentrated on the island of Oahu, such that total population as reported by the census may have presented a distorted picture of the state's population. *Id.* at 94-95. Accordingly, the state attempted to equalize the number of registered voters. The Court held that states are not required to use total population as measured by the census as the basis for redistricting, and that they may exclude "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime" from the population base. *Id.* at 91-92. It held that the use of registered or actual voters as the population base was generally problematic, *id.* but nonetheless affirmed the state's plan only because it "substantially approximated" the results that would have been achieved using state citizen population as the base. *Id.* at 96. The Court was careful to note that its holding was limited to the specific facts before it and that it was not a blanket endorsement of using registered voters as an apportionment base. *Id.* ("We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere.").

In *amici*'s view, notwithstanding *Burns*, there remains a substantial question whether states may utilize a metric other than total population for redistricting purposes.[7] But the Court need not decide that question for purposes of this case. Even if states are not required to rely on total population as measured by the census, the plain language of the Four-

---

[7] *Cf. Kirkpatrick*, 394 U.S. at 534 ("There may be a question whether distribution of congressional seats except according to total population can ever be permissible under Art. I, § 2.").

teenth Amendment and the consistent practice of this Court make it clear that they are permitted to do so. The Court should reaffirm that total population is an appropriate basis for redistricting.

II. Registered Voters and Actual Voters Are Not a Reliable or Appropriate Basis for Redistricting Because of Barriers to Registration and Voting That Disproportionately Affect People of Color, Youth, the Poor, and People With Disabilities.

Appellants suggest that states should be required to redistrict so as to equalize registered voters (or "non-suspense" registered voters). For all of the reasons set forth in *Burns*, registered voters and actual voters are not a reliable or appropriate basis for redistricting. As *Burns* explains:

> "Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a ghost of prior malapportionment. Moreover, fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions." 384 U.S. at 92-93 (internal quotation marks omitted).

All of these concerns are as valid today as they were in 1966 when *Burns* was decided. For example,

voting and registration rates still fluctuate significantly from one election to the next, with rates being significantly higher in presidential election years.[8] We focus below, however, on the discriminatory impact of using registered voters or actual voters as the basis for redistricting decisions. This impact stems from the many legal and practical barriers to registration and voting that continue to exist in American society, and that disproportionately affect racial and ethnic minorities, younger and poorer Americans, and people with disabilities.

Both registration and voter turnout rates vary significantly by race and ethnicity. For example, in the 2014 congressional elections, 68.1% of non-Hispanic white citizens of voting age (*i.e.*, 18 years of age or older) were registered to vote. The comparable registration rate was 63.4% for African Americans, 51.3% for Latinos, and 48.8% for Asian Americans.[9] The voting rate (*i.e.*, voters as a percentage of CVAP) was 45.8%, for non-Hispanic whites, 39.7% for African Americans, and only 27.0% for Latinos and

---

[8] *See* Thom File, U.S. Census Bureau, *The Diversifying Electorate—Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections* 2 (May 2013) (hereinafter, "2012 Census Election Report"); Thom File, U.S. Census Bureau, *Who Votes? Congressional Elections and the American Electorate: 1978-2014*, at 1 (July 2014) (hereinafter "2014 Census Election Report").

[9] *See* U.S. Census Bureau, Voting and Registration in the Election of November 2014—Detailed Tables, Table 2, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2014/tables.html. We use the terms "African American" to refer to the group designated by the Census Bureau as "Black Alone," "Asian American" to refer to the group designated as "Asian Alone," and "Latino" and "Hispanic" interchangeably to refer to the group designated by the Census as "Hispanic."

27.1% for Asian Americans.[10] These disparities have remained relatively consistent for many years. Although registration and voting rates are higher in presidential election years, the same types of disparities occur in both presidential election and non-presidential election years.[11]

Registration and voting rates also vary significantly by age and income. For example, in the 2014 election, the registration rate for citizens in the 18 to 24 age bracket was 43.0%, and the voting rate was 18.5%. Both registration and voting rates climb steadily as voters age. For the 65 to 74 age bracket, the registration rate was 77.2% and the voting rate was 63.2%.[12] Similarly, voting and registration rates climb steadily as family income increases. For persons with family incomes under $10,000, the registration rate in 2014 was 51.7% and the voting rate 24.5%. For persons with family incomes of $150,000 and over, the registration rate was 79.5% and the voting rate was 56.6%.[13]

---

[10] *Id.*; *see also* 2014 Census Election Report, *supra* note 8, at 4. Looking at the data another way, in 2014, the percentage of non-Hispanic white voters exceeded their share of the voting-eligible population by 6.4%, whereas the percentage of Hispanic voters lagged their share of the voting-eligible population by 4.1%. *Id.* at 9.

[11] *See* 2014 Census Election Report, *supra* note 8, at 4, 9; 2012 Census Election Report, *supra* note 8, at 3.

[12] U.S. Census Bureau, Voting and Registration in the Election of November 2014—Detailed Tables, Table 7, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2014/tables.html.

[13] *Id.*

These factors are all closely linked, since racial and ethnic minority groups are, on average, younger and poorer than non-Hispanic whites. Notably, the confluence of these factors is likely to have a special impact on members of the lesbian, gay, bisexual or transgender ("LGBT") community. A 2012 Gallup survey found that nonwhites and younger Americans are more likely to identify as LGBT, and that LGBT Americans tend to have lower incomes than non-LGBT individuals.[14]

Finally, there are also disparities in registration and voting rates based on disability status. These disparities tend to be more pronounced in presidential election years. One recent study found that in the 2012 election, among people with disabilities, 69.2% reported being registered to vote, compared to 71.5% for people without disabilities. Among those who were registered, 82.1% voted, as compared to the 87.5% of registered citizens without disabilities who voted.[15] From 2008 to 2012, when other demographic characteristics (such as age, gender, race and ethnicity, and marital status) are held constant, the turnout gap between persons with disabilities and those without disabilities is about 12 percentage points.[16]

---

[14] Gary J. Gates & Frank Newport, *Special Report: 3.4% of U.S. Adults Identify as LGBT*, Gallup (Oct. 18, 2012), *available at* http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx.

[15] *See* Lisa Schur, *Reducing Obstacles to Voting for People With Disabilities*, White Paper for Presidential Commission on Election Administration, at 1-2 (June 22, 2013), *available at* http://vote.caltech.edu/content/reducing-obstacles-voting-people-disabilities.

[16] *Id.* at 2.

Although there are doubtless many reasons for these persistent disparities, they result in large part from the cumulative effect of various legal and practical barriers to registration and voting that exist in American society.

As a starting point, voter registration records in the United States are notoriously unreliable. The Presidential Commission on Election Administration recently noted that most statewide voter registration lists aggregate county and local records that exist on paper, and "[w]ith so many jurisdictions responsible for the registration lists, their quality is uneven and too many records are inaccurate, obsolete or never entered into the system."[17] Errors in voter registration records are widespread. The Commission reported that as many as 8% of registration records, representing 16 million people, are invalid or significantly inaccurate, and that in some states, more than 15% of records on registration lists have been inaccurate.[18] Thus, for example, "[v]oters who think they registered or updated their address at the DMV show up at polling locations only to find out they are *not* registered or are in the wrong polling location."[19]

Adding to the problem, election officials regularly conduct purges of voter registration records. Properly done, voter list maintenance is a way to improve the accuracy of registration records, but in practice, purges are often conducted through processes that are "shrouded in secrecy, prone to error, and vulner-

---

[17] *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 15 (Jan. 2014) (hereinafter "*American Voting Experience*").

[18] *Id.* at 23.

[19] *Id.*

able to manipulation."[20] For example, in advance of the primary and general elections in 2012, Florida conducted two purges to remove suspected non-citizens from the voter rolls, with the result that some naturalized citizens were improperly purged.[21] Regardless of intention, purges of this nature are likely to have a discriminatory impact on minority registration. A related problem is the phenomenon of "voter caging," in which a group sends non-forwardable mail to a list of voters at their registration address, and then requests that election officials cancel the registration of voters whose mailing is returned as undeliverable.[22] This method of identifying ineligible voters is highly unreliable and can be used to selectively target particular groups, including racial and ethnic minorities.

Another problem is simply the difficulty of the registration process. Although the National Voter Registration Act, 52 U.S.C. §§ 20501 *et seq.* requires state motor vehicle departments and public assistance agencies to provide registration materials and ensure

---

[20] *See generally* Myrna Perez, Brennan Center for Justice, *Voter Purges* (2008), *available at* https://www.brennancenter.org/publication/voter-purges.

[21] *See Arcia v. Fla. Sec'y of State*, 772 F.3d 1335 (11th Cir. 2014) (holding that purges violated NVRA because they were conducted less than 90 days before elections).

[22] Perez, *supra* note 20, at 32; *see also Mont. Democratic Party v. Eaton*, 581 F Supp. 2d 1077 (D. Mont. 2008) (challenges filed to 6,000 voters in counties with high concentration of Democratic voters based on comparison of registration records to Postal Service change of address registry); *Miller v. Blackwell*, 348 F. Supp. 2d 916 (S.D. Ohio 2004) (challenges filed to 35,000 newly registered Ohio voters based on allegations that mailings had been returned).

that the communities they serve have the opportunity to vote, the Presidential Commission on Election Administration found widespread noncompliance with these laws.[23] The Commission found that increased use of online voter registration would make it easier for voters to register, but as of August 2013, only 19 states had authorized or implemented a complete online voter registration system.[24] Moreover, many of the states that do offer online voting registration require significant improvements. For example, many online registration systems are not fully accessible to voters with disabilities.[25]

Felon disenfranchisement laws also have a significant impact on minority voter registration in some jurisdictions. Many of these laws date to the Jim Crow era, and were enacted for the purpose of keeping minorities from voting.[26] Regardless of their intent, felon disenfranchisement laws continue to have

---

[23] *American Voting Experience*, *supra* note 17, at 17.

[24] *Id.* at 23-24.

[25] Susan Mizner & Eric Smith, American Civil Liberties Union, *Access Denied* (Jan. 2015), *available at* https://www.aclu.org/feature/access-denied.

[26] *See Hunter v. Underwood*, 471 U.S. 222 (1985) (Alabama felon disenfranchisement law adopted in 1901 was "motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect"); Alexander Keysser, *The Right to Vote: The Contested History of Democracy in the United States* 111-12 (2000) (discussing felon disenfranchisement laws as one of several techniques adopted in Jim Crow Era, and noting that "[t]he overarching aim of such restrictions, usually undisguised, was to keep poor and illiterate blacks—and in Texas, Mexican Americans—from the polls"); *id.* at 162 (noting that felon disenfranchisement laws in the South often "target[ed] minor violations of the law that could be invoked to disenfranchise African Americans").

a negative and disproportionate effect on minority voting rights. A study by the Sentencing Project concluded that, as of 2010, roughly 7.7% of the African American voting age population—roughly one in thirteen—was disenfranchised, as compared to 1.8% of the non-African American population. In three states—Florida, Virginia, and Kentucky—more than one in five African Americans is disenfranchised.[27]

There are also numerous legal and practical barriers to voting that tend to disproportionately affect racial and ethnic minorities and people with disabilities. In recent years, many states have enacted changes to their registration and voting procedures that make it more difficult and burdensome to vote. For example, several states have enacted new voter identification laws. These laws may have both the purpose and effect of discriminating against minority voters. Texas, for example, enacted one of the nation's strictest voter identification laws in 2011. A District Court concluded that both that the law would have a discriminatory impact against Latinos and African Americans and that it was imposed with an unconstitutional discriminatory purpose.[28] The Fifth Circuit recently affirmed the finding of discriminatory effect, though it vacated the discriminatory purpose claim and remanded for further considera-

---

[27] *See* Christopher Uggen et al., The Sentencing Project, *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, at 1-2 (July 2012), *available at* http://www.sentencingproject.org/detail/publication.cfm?publication_id=400.

[28] *Veasey v. Perry*, 71 F. Supp.3d 627, 633 (S.D. Tex. 2014), *aff'd in part, rev'd in part sub nom. Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

tion.[29] As this case illustrates, regardless of the motive behind such laws, they still may have a discriminatory impact on minority voters.[30] Other types of laws that may have a disparate impact on minority voters include laws eliminating or restricting such practices as same-day registration or early voting, which are frequently used by minority voters.[31]

Many minority voters also face discrimination at polling places. For example, the language minority population in the United States grew from 23 million in 1980 to 59.5 million in 2010—a 158% increase.[32] Some 20% of the population speaks a language other than English at home, and 42% of these people report being limited-English proficient—*i.e.*, having

---

[29] *Veasey v. Abbott*, 796 F.3d 487 (5th Cir. 2015).

[30] Such laws are also likely to have an impact on transgender voters, who face unique challenges to obtaining accurate government identification. *See* Jody L. Herman, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2014 General Election* (Sept. 2014), *available at* http://williamsinstitute.law.ucla.edu/wp-content/uploads/voter-id-laws-september-2014.pdf.

[31] *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224 (4th Cir. 2014) (affirming preliminary injunction against law eliminating same-day registration and prohibiting counting of out-of-precinct ballots); *Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524 (6th Cir.) (affirming preliminary injunction against law reducing number of early voting days, where evidence showed that African American and indigent voters used early voting more frequently that white and affluent voters), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

[32] Camille Ryan, U.S. Census Bureau, *Language Use in the United States: 2011*, at 7, *available at* https://www.census.gov/prod/2013pubs/acs-22.pdf.

some difficulty with the English language.[33] Many eligible voters within this considerable segment of the American population encounter significant difficulty in exercising their right to vote.[34] One study suggests that turnout for language-minority voters was 9% lower than turnout by those who do not have language barriers.[35] And it is not hard to see why. Translated election materials and bilingual election workers are too frequently unavailable to those who need them.[36] The Presidential Commission also found that many jurisdictions fail to comply with Sections 203 and 208 of the Voting Rights Act, which require poll workers to provide language assistance in communities with large non-English speaking populations and allow voters who are unable to read

---

[33] *Id.* at 2, 4. The current definition of limited English proficiency ("LEP") is persons who speak English less than "very well." The Census Bureau has determined that most respondents overestimate their English proficiency and therefore, those who answer other than "very well" are deemed LEP. See H.R. Rep. No. 102-655 (1992), at 8, *reprinted* in 1992 U.S.C.C.A.N. 772.

[34] *See, e.g.*, Asian American Legal Defense and Education Fund, *Asian American Access to Democracy in the 2014 Elections*, at 14-28 (August 6, 2015), *available at* http://aaldef.org/Access%20to%20Democracy%20Report%202012.pdf.

[35] Asian American Justice Center, *Behind the Numbers: Post-Election Survey of Asian American and Pacific Islander Voters in 2012*, at 9 (Apr. 2013), *available at* http://www.advancingequality.org/news-media/publications/behind-numbers-post-election-survey-asian-americans-and-pacific-islander.

[36] *Id.* at 10; Asian Americans Advancing Justice, *Voices of Democracy: Asian Americans and Language Access During the 2012 Elections*, at 10-13 (Aug. 2013), *available at* http://dww.advancingjustice-aajc.org/sites/aajc/files/Full-layout-singlesv1-072313.pdf.

ballots to gain assistance from a person of their choice.[37] It further noted that:

> "Language difficulties can affect voter participation throughout the electoral process. If ballot materials and election agency websites are only in English, then voters with limited English will be less able to navigate the registration process. Inadequate supplies of bilingual poll workers or ballots in other languages will make it more difficult for them to vote. These problems are then compounded for certain groups, such as Alaskan Native voters, who face additional logistical problems due to other forms of geographic and social isolation from election authorities."[38]

In some cases, minority voters face not only lack of adequate assistance but outright hostility from poll workers. For example, in Berks County, Pennsylvania, a federal District Court concluded that there was substantial evidence of hostile and unequal treatment of Hispanic voters. These included situations where poll workers turned away or refused to deal with Hispanic voters, made "rude, hostile and racist comments" in their presence, and required Hispanic voters to prove their residency while not requiring other voters to do so.[39] While this may be an extreme example, it is not unique, and it is illustrative of the kinds of barriers many minority voters continue to face today that may have a significant impact on voter turnout.

---

[37] *American Voting Experience*, *supra* note 17, at 16.

[38] *Id.* (footnotes omitted).

[39] *United States v. Berks Cnty.*, 250 F. Supp. 2d 525, 529, 539 (E.D. Pa. 2003)

Discriminatory treatment at polling places is also a problem for voters with disabilities. The Presidential Commission also noted "the continued inaccessibility of many polling places and voting machines, as well as more direct impediments such as statutory bans on voting faced by those with cognitive impairments," as well as concerns about the training of poll workers and election officials.[40] A nationally representative survey following the 2012 elections found that 30% of voters with disabilities reported difficulty in voting at a polling place in 2012, as compared with 8% of voters without disabilities.[41] The most common problems included reading or seeing the ballot, understanding how to vote or use the voting equipment, waiting in line, and finding or getting to the polling place.[42] A recent decision from the Second Circuit illustrates some of the most serious problems, affirming a District Court decision that the New York City Board of Elections had violated the Americans with Disabilities Act and the Rehabilitation Act by failing to provide persons with disabilities meaningful access to polling places.[43] The court found "pervasive and recurring barriers" at poll sites, including "dangerous ramps at entrances deemed 'accessible,' inadequate signage directing voters with disabilities to accessible entrances or voting areas, blocked entryways or pathways, and inaccessible interior spaces inside voting areas."[44]

---

[40] *American Voting Experience*, *supra* note 17, at 16-17.

[41] *Schur*, *supra* note 15, at 4.

[42] *Id.*

[43] *Disabled in Action v. Bd. of Elections*, 752 F.3d 189 (2d Cir. 2014)

[44] *Id.* at 191, 199.

Minority communities also bear the burden of inadequate resources being allocated to election administration. Long wait times at polling places are the most visible indication of this problem. The Presidential Commission found that in the 2012 election, over five million voters experienced wait times of over an hour, and an additional five million experienced wait times between half an hour and an hour.[45] This problem does not affect all jurisdictions equally. Another study has found that voters in precincts with higher percentages of more minorities experienced longer waits and that those precincts tended to have fewer machines.[46] For example, in South Carolina, the 10 precincts with the longest waits had, on average, more than twice the percentage of African American registered voters (64%) than the statewide average (27%), and in Maryland, the ten precincts with the lowest number of machines per voter had, on average, more than double the percentage of Latino voting age citizens (19%) as the statewide average (7%).[47] Furthermore, long lines may deter voter participation.[48]

---

[45] *American Voting Experience*, *supra* note 17, at 13.

[46] Christopher Famighetti et al., Brennan Center for Justice, *Election Day Long Lines: Resource Allocation* 1 (2014), *available at* https://www.brennancenter.org/publication/election-day-long-lines-resource-allocation.

[47] *Id.*

[48] *See, e.g.*, Michael C. Herron & Daniel A. Smith, Advancement Project, *Congestion at the Polls: A Study of Florida Precincts in the 2012 General Election* 1 n.5 (June 24, 2013) ("There seems to be little doubt that many prospective voters who endured long lines ended up leaving the queue; others, upon seeing a long line, decided not to join the queue in the first place.").

In short, a wide variety of both legal and practical barriers impact people's ability to register and vote, and these barriers tend to have a disparate impact on racial and ethnic minorities and people with disabilities. The foregoing examples are merely intended as illustrations, not as a comprehensive list. The same problems do not necessarily exist to the same degree in all jurisdictions, even within the same state. These problems help to illustrate that the American voting system is far from perfect and that these imperfections disproportionately affect some groups more than others. Using registered voters or actual voters as the basis for redistricting would reinforce and exacerbate these discriminatory effects.

For all of these reasons, the Court should hold that registered voters and actual voters are not a reliable or appropriate basis for redistricting.

III. Assuming That CVAP Is a Constitutionally Permissible Basis for Redistricting, States Can Reasonably Find That Total Population Is Fairer and More Appropriate.

The other metric identified by plaintiffs as a possible basis for redistricting is CVAP.. In the view of *amici*, use of CVAP is questionable, since the Equal Protection Clause by its terms applies to all persons within a State's jurisdiction, including both children and noncitizens.[49] But regardless of whether use of

---

available at http://b.3cdn.net/advancement/f5d1203189ce2aabfc_14m6vzttt.pdf.

[49] *See, e.g., Plyler v. Doe*, 457 U.S. 202, 210-16 (1982) (finding that noncitizen "aliens" unlawfully present in United States are still "persons" entitled to equal protection under the Fourteenth Amendment and that it would be unconstitutional for states to deny noncitizen children equal access to public education).

CVAP is permissible, it certainly should not be ***required***. States may reasonably conclude that total population is a fairer and more appropriate basis for redistricting than CVAP for a number of reasons. In particular, using CVAP rather than total population would disproportionately affect minority communities and unfairly deprive them of full representation in their government.

Using CVAP rather than total population as the basis for redistricting would have a significant disparate impact on racial and ethnic minority groups. If such a standard were applied uniformly across the nation, it would exclude only 21% of non-Hispanic whites from the population base. In contrast, it would exclude approximately 55% of the Latino population, 45% of the Asian American population, 30% of the African American population, 30% of the Native Hawaiian/Pacific Islander population, and 31% of the American Indian/Alaskan Native population.[50] Thus switching to CVAP would result in a disproportionate exclusion of racial and ethnic minorities from the population base. This would amount to a massive shift in political power away from groups that are already disadvantaged in the political process and further concentrate power in the hands of a white plurality that does not adequately represent the full diversity of the total population.

There are two reasons for these disparities between total population and CVAP First, minority communities are significantly younger, on average, than the general population, with the result that the percentage of people under the age of 18 is higher in these communities than in the population at large.

---

[50] See calculations and data in Appendix C.

As of 2014, the median age for the U.S. population as a whole was 37.2 years, and the median age for non-Hispanic whites was 42.0 years. In contrast, Latinos, the nation's youngest ethnic group, had a median age of 27.3 years. Other minority groups are also younger than the general population. The median age was 32.7 for African Americans, 31.7 for American Indians and Alaska Native, 35.4 for Asian Americans, and 29.7 for Native Hawaiians and Other Pacific Islanders.[51]

Notably, the overwhelming majority of those under 18 who would be excluded from the population base under a CVAP standard are U.S. citizens. For example, 95% of Latinos, 87% of Asian Americans, and 98% of African Americans under the age of 18 are citizens.[52] Over the course of the ten years that a redistricting plan is typically in effect, a substantial portion of the underage population will turn 18 and become eligible to vote. Moreover, citizens under the age of 18 are deeply affected by a variety of government actions, including among other things actions relating to public education. This Court and the States can reasonably conclude that citizens should not be excluded from the population base for redistricting purposes simply because they have not yet reached voting age.

The second reason for the disparity between CVAP and total population is that some minority groups

---

[51] U.S. Census Bureau, *Annual Estimates of the Resident Population by Sex, Age, Race, and Hispanic Origin for the United States and the States: April 1, 2010 to July 1, 2014, available at* http://www.census.gov/popest/data/national/asrh/2014/index.html.

[52] See calculations and data in Appendix C.

include significant numbers of immigrants who have not been naturalized. For example, about 24% of Latinos and 27% of Asian Americans are noncitizens.[53] A substantial number of these people, however, are eligible to become citizens. As of January 2013, approximately 13.1 million lawful permanent residents ("LPRs") lived in the United States, and 8.8 million—roughly two thirds—were eligible for naturalization.[54] The largest numbers come from Mexico (25.0% of the total), China (5.0%), the Philippines (4.4%), India (4.1%), the Dominican Republic (3.7%) and Cuba (3.1%).[55]

Many of these people will eventually complete the naturalization process and become U.S. citizens. Others, of course, will not. The naturalization process is complicated and requires applicants to clear a series of hurdles before they can become U.S. citizens. In general, to be eligible for naturalization, an immigrant must have continuously resided in the United States for at least five years after being admitted for permanent residence.[56] Applicants must also demonstrate "good moral character"[57] and an ability to read, write and speak basic English,[58] and pass a civic test to demonstrate "a knowledge and

---

[53] *Id.*

[54] Bryan Baker & Nancy Rytina, Office of Immigration Statistics, Dep't of Homeland Sec., *Estimates of the Lawful Permanent Resident Population in the United States: January 2013*, at 1 (Sept. 2014).

[55] *Id.* at 4.

[56] 8 U.S.C. § 1427(a)(1).

[57] *Id.* § 1427(a)(3).

[58] *Id.* § 1423(a).

understanding of the fundamentals of the history, and of the principles and form of government, of the United States."[59] Applicants are also subject to a personal investigation by immigration authorities.[60] There is also a $595 filing fee and an $85 biometrics fee.[61] Many applicants may pay additional amounts or a lawyer or other advocate to assist them with the process, especially if complications arise.

Taken together, these requirements amount to substantial barriers that deter many otherwise eligible people from seeking to become citizens. A recent study of Latino immigrants found that 93% of those who had not yet naturalized said they would become citizens if they could.[62] When asked about their main reasons for not naturalizing, 26% cited personal reasons such as inability to speak English or the difficulty of the citizenship test.[63] Another 18% cited administrative barriers, chief among them the cost of the naturalization process.[64]

Regardless of whether they are eligible to naturalize or choose to do so, noncitizens who live in the

---

[59] 8 C.F.R. § 312.2.

[60] 8 U.S.C. § 1446(a).

[61] *See* U.S. Citizen and Immigration Servs., Dep't of Homeland Sec., Form G-1055 (Dec. 18, 2014), *available at* http://www.uscis.gov/fees.

[62] Paul Taylor et al., Pew Hispanic Center, *An Awakened Giant: The Hispanic Electorate is Likely to Double by 2030*, at 21 (Nov. 14, 2012), *available at* http://www.pewhispanic.org/2012/11/14/an-awakened-giant-the-hispanic-electorate-is-likely-to-double-by-2030.

[63] *Id.*

[64] *Id.*

United States have a deep stake in their communities' government, just as citizens do. For example, immigrants have a vital interest in public education, and are deeply integrated into our educational systems. In 2009, 7.3 million children had a parent who was a noncitizen,[65] and children with at least one unauthorized immigrant parent made up 6.9% of students enrolled in kindergarten through 12th grade in 2012. Most of these (5.5% of all students) are U.S.-born children who are U.S. citizens at birth.[66] Immigrants also represent a key component of the American economy. In 2014, there were 25.7 million foreign-born persons, in the U.S. labor force, comprising 16.5 percent of the total.[67] Even undocumented immigrants significantly contribute to state and local taxes, collectively paying an estimated $11.84 billion in 2012.[68] In short, noncitizen immigrants are deeply enmeshed in American society, and

---

[65] Immigration Policy Center, American Immigration Council, *Strength In Diversity: The Economic and Political Clout of Immigrants, Latinos, and Asians in the United States* 1 (Jan. 2012), *available at* http://immigrationpolicy.org/sites/default/files/docs/Strength_in_Diversity_updated_2012_0.pdf.

[66] Jeffrey S. Passel et al., *Unauthorized Immigrant Totals Rise in 7 States, Fall in 14*, at 16 (Pew Research Center 2014), *available at* http://www.pewhispanic.org/files/2014/11/2014-11-18_unauthorized-immigration.pdf. In Texas the share of students with unauthorized immigrant parents—at 13.1%—was significantly higher. *Id.* at 17.

[67] U.S. Bureau of Labor Statistics, *Foreign-Born Workers: Labor Force Characteristics—2014* (May 21, 2015). *available at* http://www.bls.gov/news.release/pdf/forbrn.pdf.

[68] Matthew Gardner et. al., Institute on Taxation and Economic Policy, *Undocumented Immigrants' State and Local Tax Contributions* 1 (Apr. 2015), *available at* http://www.itep.org/pdf/undocumentedtaxes2015.pdf.

states may reasonably conclude that they should not be excluded from representation in the political process.

CONCLUSION

The Court should reaffirm that the Fourteenth Amendment's "one-person, one vote" requirement is satisfied when districts are drawn so as to be approximately equal in total population. The decision of the District Court should be affirmed on that basis.

Respectfully submitted,

WADE J. HENDERSON
LISA M. BORNSTEIN
THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS
1629 K St., N.W.,
10th Floor
Washington, DC 20006
(202) 466-3311

Penda D. Hair
Katherine Culliton-González
ADVANCEMENT PROJECT
1220 L Street, N.W.,
Suite 850
Washington, D.C. 20005
(202) 728-9557

MATTHEW M. HOFFMAN
Counsel of Record
ANDREW KIM
GOODWIN PROCTER LLP
901 New York Ave., N.W.
Washington, DC 20001
(202) 346-4000

Juan Cartagena
Joanna Elise Cuevas Ingram
Martha Pardo
LATINOJUSTICE PRLDEF
99 Hudson St.,
14th Floor
New York, NY 10013
(212) 219-3360

Terry Ao Minnis
Eugene Chay
ASIAN AMERICAN JUSTICE CENTER
1140 Connecticut Ave., N.W., Suite 1200
Washington, DC 20036
(202) 296-2300

Margaret Fung
Jerry Vattamala
ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
99 Hudson St,, 12th Floor
New York, NY 10013
(212) 966-5932

Erin Hustings
NALEO EDUCATIONAL FUND
600 Pennsylvania Ave. S.E., Suite 230
Washington, DC 20003
(202) 546-2536

Nicholas Espiritu
Alvaro M. Huerta
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Blvd., Suite 2850
Los Angeles, CA 90010
(213) 639-3900

September 25, 2015

APPENDIX A

The Leadership Conference on Civil and Human Rights Participating Member Organizations

(Bold names denote Executive Committee member organizations)

9 to 5 National Association of Working Women

A. Philip Randolph Institute

AARP

Advancement Project

Alaska Federation of Natives

Alpha Kappa Alpha Sorority, Inc.

Alpha Phi Alpha Fraternity, Inc.

American-Arab Anti-Discrimination Committee

American Association for Access Equity and Diversity (AAAED)

American Association of Colleges for Teacher Education

American Association of People with Disabilities

AAUW

American Civil Liberties Union

American Council of the Blind

American Ethical Union

American Federation of Government Employees

American Federation of Labor-Congress of Industrial Organizations

American Federation of State, County & Municipal Employees, AFL-CIO

American Federation of Teachers, AFL-CIO

American Islamic Congress (AIC)

American Jewish Committee

American Postal Workers Union, AFL-CIO

American Society for Public Administration

American Speech-Language-Hearing Association

Americans for Democratic Action

Americans United for Separation of Church and State

Amnesty International USA

Anti-Defamation League

Appleseed

Asian Americans Advancing Justice | AAJC

Asian Pacific American Labor Alliance

B'nai B'rith International

Bend the Arc

Brennan Center for Justice at New York University School of Law

Center for Community Change

Center for Law and Social Policy (CLASP)

Center for Responsible Lending

Center for Social Inclusion

Children's Defense Fund

Church of the Brethren-World Ministries Commission

Coalition of Black Trade Unionists

Coalition on Human Needs

Common Cause

Communications Workers of America

Community Action Partnership

Community Transportation Association of America

Compassion & Choices

Consortium for Citizens with Disabilities (CCD)

DC Vote

Delta Sigma Theta Sorority

Dēmos

Disability Rights Education and Defense Fund

Disability Rights Legal Center

Division of Homeland Ministries-Christian Church (Disciples of Christ)

Epilepsy Foundation of America

Equal Justice Society

FairVote: The Center for Voting and Democracy

Families USA

Federally Employed Women

Feminist Majority

Friends Committee on National Legislation

Gay, Lesbian and Straight Education Network (GLSEN)

General Board of Church & Society of the United Methodist Church

Global Rights: Partners for Justice

GMP International Union

Hip Hop Caucus

Human Rights Campaign

Human Rights First

Immigration Equality

International Association of Machinists and Aerospace Workers

International Association of Official Human Rights Agencies

International Brotherhood of Teamsters

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)

Iota Phi Lambda Sorority, Inc.

Japanese American Citizens League

Jewish Council for Public Affairs

Jewish Labor Committee

Judge David L. Bazelon Center for Mental Health Law

Kappa Alpha Psi Fraternity

Labor Council for Latin American Advancement

Laborers' International Union of North America

Lambda Legal

LatinoJustice PRLDEF

Lawyers' Committee for Civil Rights Under Law

League of United Latin American Citizens

League of Women Voters of the United States

Legal Aid Society – Employment Law Center

Legal Momentum

Matthew Shepard Foundation

Mexican American Legal Defense and Educational Fund

Muslim Advocates

NAACP

NAACP Legal Defense and Educational Fund, Inc.

NALEO Educational Fund

National Alliance of Postal & Federal Employees

National Association for Equal Opportunity in Higher Education

National Association of Community Health Centers

National Association of Consumer Advocates (NACA)

National Association of Human Rights Workers

National Association of Neighborhoods

National Association of Social Workers

National Bar Association

National Black Caucus of State Legislators

National Black Justice Coalition

National CAPACD

National Center for Lesbian Rights

National Center for Transgender Equality

National Center on Time & Learning

National Coalition for the Homeless

National Coalition on Black Civic Participation

National Coalition to Abolish the Death Penalty

National Committee on Pay Equity

National Committee to Preserve Social Security & Medicare

National Community Reinvestment Coalition

National Congress of American Indians

National Consumer Law Center

National Council of Churches of Christ in the U.S.

National Council of Jewish Women

National Council of La Raza

National Council of Negro Women

National Council on Independent Living

National Disability Rights Network

National Education Association

National Employment Lawyers Association

National Fair Housing Alliance

National Farmers Union

National Federation of Filipino American Associations

National LGBTQ Task Force

National Health Law Program

National Hispanic Media Coalition

National Immigration Forum

National Immigration Law Center

National Korean American Service and Education Consortium, Inc. (NAKASEC)

National Latina Institute for Reproductive Health

National Lawyers Guild

National Legal Aid & Defender Association

National Low Income Housing Coalition

National Network for Arab American Communities (NNAAC)

National Organization for Women

National Partnership for Women & Families

National Senior Citizens Law Center

National Sorority of Phi Delta Kappa, Inc.

National Urban League

National Women's Law Center

Native American Rights Fund

Newspaper Guild

OCA

Office of Communications of the United Church of Christ, Inc.

Omega Psi Phi Fraternity, Inc.

Open Society Policy Center

Paralyzed Veterans of America

Parents, Families, Friends of Lesbians and Gays

People for the American Way

Phi Beta Sigma Fraternity, Inc.

Planned Parenthood Federation of America, Inc.

PolicyLink

Poverty & Race Research Action Council (PRRAC)

Presbyterian Church (USA)

Pride at Work

Prison Policy Initiative

Project Vote

Public Advocates

Religious Action Center of Reform Judaism

Retail Wholesale & Department Store Union, AFL-CIO

SAALT (South Asian Americans Leading Together)

Secular Coalition for America

Service Employees International Union

Sierra Club

Sigma Gamma Rho Sorority, Inc.

Sikh American Legal Defense and Education Fund

Sikh Coalition

Southeast Asia Resource Action Center (SEARAC)

Southern Christian Leadership Conference

Southern Poverty Law Center

TASH

Teach For America

The Andrew Goodman Foundation

The Arc

The Association of Junior Leagues International, Inc.

The Association of University Centers on Disabilities

The Center for Media Justice

The Council of Parent Attorneys and Advocates Inc. (COPAA)

The National Conference for Community and Justice

The National PTA

The Voter Participation Center

TransAfrica Forum

Transportation Learning Center

Union for Reform Judaism

Unitarian Universalist Association

UNITE HERE!

United Brotherhood of Carpenters and Joiners of America

United Church of Christ-Justice and Witness Ministries

United Farm Workers of America (UFW)

United Food and Commercial Workers International Union

United Mine Workers of America

United States International Council on Disabilities

United States Students Association

United Steelworkers of America

Wider Opportunities for Women

Workers Defense League

YWCA USA

APPENDIX B

Amici Curiae Joining as Signatories

The following organizations join as individual signatories to this Brief:

AALDEF is a 41-year-old national civil rights organization that promotes and protects the civil rights of Asian Americans through litigation, legal advocacy, and community education.

Advancement Project is a next generation, multi-racial civil rights organization founded by veteran voting rights lawyers that seeks to fulfill America's promise of a caring, inclusive and just democracy.

The **American-Arab Anti-Discrimination Committee** ("ADC") is the country's largest Arab American civil rights organization. Founded in 1980 by United States Senator James Abourezk, ADC consists of members from all 50 states and has multiple chapters nationwide. ADC has been at the forefront of protecting the Arab-American community for over thirty-five years against discrimination, racism, and stereotyping.

The **American Federation of Labor and Congress of Industrial Organizations** is a federation of 56 national and international unions with a total membership of approximately 12.5 million working men and women employed across this country in all sectors of our economy. Union members are registered, active voters committed to the prosperity of this country.

The **American Jewish Committee**, founded in 1906, has a long record of support for the one person one vote principle and the full accountability of the political system to all persons.

The **Anti-Defamation League** ("ADL") was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudice in the United States. ADL is vitally interested in protecting the civil rights of all persons and in ensuring that each individual receives equal treatment under the law regardless of race, sex, sexual orientation, gender identity, ethnicity, or religion.

Asian Americans Advancing Justice | Asian American Justice Center is a nonprofit, nonpartisan organization that seeks to promote a fair and equitable society for all by working for civil and human rights and empowering Asian American, Native Hawaiian, and Pacific Islander communities.

Farmworker Justice is a non-profit organization that seeks to empower migrant and seasonal farmworkers to improve their living and working conditions, immigration status, health, occupational safety, and access to justice.

Hispanic Federation, Inc. is a nonprofit membership organization that works to empower and advance the Hispanic community through public policy advocacy, leadership development and community revitalization projects. Established in 1990, Hispanic Federation ("HF") has grown to become one of the premier Latino organizations in the nation.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving the recognition of the civil rights of lesbian, gay, bisexual and transgender people and those living with HIV through impact litigation, education and public policy work. Lambda Legal has designated racial justice and low-income ad-

vocacy as a program priority and is concerned about the negative impacts a ruling forbidding use of total population for redistricting purposes would have on the communities it represents.

LatinoJustice PRLDEF was founded in 1972. Its continuing mission is to protect the civil rights of all Latinos and to promote justice for the pan-Latino Community, especially across the Eastern United States. It has worked to secure the voting rights and political participation of Latino voters since 1972.

The **League of Women Voters of the United States** is a nonpartisan, community-based organization that encourages the informed and active participation of citizens in government and influences public policy through education and advocacy. Founded in 1920 as an outgrowth of the struggle to win voting rights for women, the League is organized in close to 800 communities and in every state, with more than 150,000 members and supporters nationwide. The League promotes an open governmental system that is representative, accountable, and responsive. The League has been a leader in protecting the right to vote for 95 years and seeking reform of the redistricting process at the state, local, and federal levels for more than three decades.

The **NALEO Educational Fund** is the leading nonprofit organization that facilitates full Latino participation in the American political process, from citizenship to public service.

The **National Association for the Advancement of Colored People** ("NAACP"), founded in 1909, is the nation's oldest and largest civil rights organization. The NAACP's principal objectives are to ensure the political, educational, social and eco-

nomic equality of all citizens; to achieve equality of rights and eliminate race prejudice among the citizens of the United States; to remove all barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof. The NAACP has a long history of advocating to protect minority voting rights and to ensure effective legislative representation for African-Americans and other racial minorities.

The **National Association of Social Workers** ("NASW") is the largest association of professional social workers in the United States with over 130,000 members in 55 chapters. NASW develops policy statements on issues of importance to the social work profession. Consistent with those statements, NASW reaffirms that participation in electoral politics is consistent with fundamental social work values, such as self-determination, empowerment, democratic decision making, equal opportunity, inclusion, and the promotion of social justice.

The **National Immigration Law Center** is the primary national organization in the United States exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their families.

The **National Urban League** is an historic civil rights and urban advocacy organization dedicated to economic empowerment in historically underserved urban communities. Founded in 1910, the National Urban League improves the lives of more than two

million people annually through direct service programs that are implemented locally by more than 90 Urban League affiliates in 300 communities across 36 states and the District of Columbia.

People For the American Way Foundation ("PFAWF") is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including the right to vote and equal protection of the laws. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values and to help overcome barriers to voting and political participation.

The **Service Employees International Union** ("SEIU") represents nearly 2 million men and women who work in the service industries throughout the United States. SEIU members represents a diverse cross-section of the United States, in terms of race and ethnicity. Many SEIU members face historical barriers to voter registration, and voting itself, and would therefore be negatively affected were the Court to permit jurisdictions to use citizen-age voting population as an appropriate metric for redistricting. Likewise, a significant percentage of SEIU members reside in jurisdictions that would be dramatically affected by a shift in the longstanding practice of drawing district lines based on total population.

Southwest Voter Registration Education Project ("SVREP") Southwest Voter is the largest and oldest non-partisan Latino voter participation organization in the United States. It was founded by the late William C. Velasquez and other Mexican-American political activists to protect the voting

rights of Mexican-Americans in the Southwest and empower Latinos and other minorities by increasing their participation in the American democratic process. Southwest Voter fulfills its organization mission by mobilizing Latinos to register and vote, including in Texas, conducting non-partisan campaigns to raise Latino voting, and participating in litigation. SVREP opened its doors in 1974. Since then SVREP has registered 2.6 million Latinos, trained 150,000 Latino leaders and won 85 voting rights lawsuits.

Voting Rights Forward ("VRF") is a nonpartisan, civil rights organization committed to protecting the rights of all voters. VRF supports fair, honest, impartial and competitive redistricting plans.

APPENDIX C

Racial and Ethnic Demographic Data Relating to Voting Age And Citizenship Based On U.S. Census American Community Survey Estimates*

UNITED STATES			
	Citizen	Noncitizen	Total
Over 18	222,363,928	20,178,299	242,542,227
Under 18	71,711,555	1,875,057	73,586,612
Total	294,075,483	22,053,356	316,128,839
Citizens as a Percentage of Total Population			93.0%
Noncitizens as a Percentage of Total Population			7.0%
CVAP as a Percentage of Total Population			70.3%
Non-CVAP as a Percentage of Total Population			29.7%
Percentage of Persons Under 18 Who Are Citizens			97.5%

* LatinoJustice PRLDEF ("LJP") calculations based on U.S. Census American FactFinder 2013 1-Year American Community Survey Data; source data and charts from the U.S. Census American Factfinder 2013 1-Year American Community Survey Data on File with LJP. Race/ethnicity categories based on U.S. Census categories guided by the 1997 OMB Office of Management and Budget (OMB) Standards on race and ethnicity. See U.S. Census, http://www.census.gov/topics/population/race/about.html.

NON-HISPANIC WHITE			
	Citizen	Noncitizen	Total
Over 18	156,231,274	2,764,714	158,995,988
Under 18	38,145,588	250,835	38,396,423
Total	194,376,862	3,015,549	197,392,411
Citizens as a Percentage of Total Group Population			98.5%
Noncitizens as a Percentage of Total Group Population			1.5%
CVAP as Percent of Total Group Population			79.1%
Non-CVAP as a Percentage of Total Group Population			20.9%
Percentage of Persons in Group Under 18 Who Are Citizens			99.3%

LATINO/HISPANIC[†]			
	Citizen	Noncitizen	Total
Over 18	24,406,626	11,858,210	36,264.836
Under 18	16,758,222	963,354	17,721,576
Total	41,164,848	12,821,564	53,986,412
Citizens as a Percentage of Total Group Population			76.3%
Noncitizens as a Percentage of Total Group Population			23.7%
CVAP as a Percentage of Total Group Population			45.2%
Non-CVAP as a Percentage of Total Group Population			54.8%
Percentage of Persons in Group Under 18 Who Are Citizens			94.6%

[†] The terms "Hispanic" or "Latino" are used interchangeably as defined by the U.S. Census Bureau and "refer to a person of Cuban, Mexican, Puerto Rican, South or Central American, or other Spanish culture or origin regardless of race." Karen R. Humes, Nicholas A. Jones & Roberto R. Ramirez, *Overview of Race and Hispanic Origin: 2010*, 2010 Census Briefs. 1. 2 (March, 2011), http://www.census.gov/prod/cen2010/briefs/c2010br 02.pdf.

ASIAN AMERICAN			
	Citizen	Noncitizen	Total
Over 18	8,730,439	3,909,498	12,639,937
Under 18	2,931,372	440,811	3,372,183
Total	11,661,811	4,350,309	16,012,120
Citizens as a Percentage of Total Group Population			72.8%
Noncitizens as a Percentage of Total Group Population			27.2%
CVAP as a Percentage of Total Group Population			54.5%
Non-CVAP as a Percentage of Total Group Population			45.5%
Percentage of Persons in Group Under 18 Who Are Citizens			86.9%

BLACK/AFRICAN AMERICAN			
	Citizen	Noncitizen	Total
Over 18	28,020,290	1,437,484	29,457,774
Under 18	10,278,511	183,086	10,461,597
Total	38,298,801	1,620,570	39,919,371
Citizens as a Percentage of Total Group Population			95.9%
Noncitizens as a Percentage of Total Group Population			4.1%
CVAP as a Percentage of Total Group Population			70.2%
Non-CVAP as a Percentage of Total Group Population			29.8%
Percentage of Persons in Group Under 18 Who Are Citizens			98.2%

AMERICAN INDIAN/ALASKAN NATIVE			
	Citizen	Noncitizen	Total
Over 18	1,737,385	83,140	1,820,525
Under 18	694,272	6,334	700,606
Total	2,431,657	89,474	2,521,131
Citizens as a Percentage of Total Group Population			96.5%
Noncitizens as a Percentage of Total Group Population			3.5%
CVAP as a Percentage of Total Group Population			68.9%
Non-CVAP as a Percentage of Total Group Population			31.1%
Percentage of Persons in Group Under 18 Who Are Citizens			99.1%

NATIVE HAWAIIAN AND OTHER PACIFIC ISLANDER			
	Citizen	Noncitizen	Total
Over 18	317,950	61,337	379,287
Under 18	138,389	8,074	146,463
Total	456,339	69,411	525,750
Citizens as a Percentage of Total Group Population			86.8%
Noncitizens as a Percentage of Total Group Population			13.2%
CVAP as a Percentage of Total Group Population			60.5%
Non-CVAP as a Percentage of Total Group Population			39.5%
Percentage of Persons in Group Under 18 Who Are Citizens			94.5%

Supreme Court, U.S.
FILED
SEP 25 2015
OFFICE OF THE CLERK

14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

—v.—

GREG ABBOTT,
in his Official Capacity as Governor of Texas, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF CITY OF LOS ANGELES AND COUNTY OF LOS ANGELES, AND 17 OTHER CITIES AND URBAN AREAS, AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

Office of the Los Angeles City Attorney
MICHAEL N. FEUER,
City Attorney
JAMES P. CLARK
VALERIE L. FLORES
HARIT U. TRIVEDI
STREFAN E. FAUBLE

Office of County of Los Angeles Counsel
MARY C. WICKHAM,
Interim County Counsel
LESTER J. TOLNAI

GREGORY L. DISKANT
Counsel of Record
JONAH M. KNOBLER
KATHRINA SZYMBORSKI
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
(212) 336-2000
gldiskant@pbwt.com

Counsel for Amici Curiae

(Additional counsel listed on inside cover)

Office of County of Los Angeles Counsel (cont.)
THOMAS J. FAUGHNAN
JUDY W. WHITEHURST
VICKI KOZIKOUJEKIAN

TIMOTHY T. COATES
GREINES, MARTIN, STEIN & RICHLAND LLP

Office of the San Francisco City Attorney
DENNIS J. HERRERA,
City Attorney
CHRISTINE VAN AKEN

City of Atlanta Department of Law
CATHY HAMPTON,
City Attorney
LAURA BURTON
CHRISTOPHER WALKER

City of Toledo Department of Law
ADAM LOUKX,
Law Director

City of South Bend Department of Law
CRISTAL C. BRISCO,
Corporation Counsel

City of Plainfield Corporation Counsel
DAVID L. MINCHELLO,
Corporation Counsel

Cook County, Illinois
ANITA ALVAREZ,
Cook County State's Attorney
DANIEL F. GALLAGHER
PAUL A. CASTIGLIONE
KENT S. RAY

City of Chicago Department of Law
STEPHEN R. PATTON,
Corporation Counsel

Baltimore City Department of Law
GEORGE A. NILSON,
City Solicitor
WILLIAM R. PHELAN, JR.

City of Cleveland Department of Law
BARBARA A. LANGHENRY,
Director of Law

Salt Lake City Attorney's Office
MARGARET D. PLANE,
City Attorney

City of Trenton Department of Law
MARC A. MCKITHEN,
Acting City Attorney

Town of Kearny
MAYOR ALBERTO G. SANTOS, ESQ.

City of Bridgeton Department of Law
REBECCA J. BERTRAM,
City Solicitor

LIST OF *AMICI CURIAE*

This brief is filed on behalf of the following 19 cities and urban areas (population in parenthesis):

- County of Los Angeles, California (10,116,705)
- Cook County, Illinois (5,246,456)
- City of Los Angeles, California (3,928,864)
- Chicago, Illinois (2,722,389)
- San Francisco, California (852,469)
- Columbus, Ohio (835,957)
- City of Baltimore, Maryland (622,793)
- Atlanta, Georgia (456,002)
- Cleveland, Ohio (389,521)
- Toledo, Ohio (281,031)
- Newark, New Jersey (280,579)
- Salt Lake City, Utah (190,884)
- Dayton, Ohio (141,003)
- South Bend, Indiana (101,190)
- Trenton, New Jersey (84,034)
- Camden, New Jersey (77,332)
- Plainfield, New Jersey (50,955)
- Kearny, New Jersey (41,837)
- City of Bridgeton, New Jersey (25,347)

TABLE OF CONTENTS

Table of Authorities iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. REDISTRICTING BASED ON ELIGIBLE VOTERS WOULD HARM AMERICA'S CITIES AND DENY EQUAL REPRESENTATION TO THEIR RESIDENTS, BOTH VOTERS AND NONVOTERS 5

A. Cities and Large Urban Areas Have Higher Concentrations of People Ineligible To Vote 8

1. Non-Citizens 8

2. Children 11

3. Mentally Incapacitated Persons 12

4. Disenfranchised Felons 13

B. Districting Based on Voting Population Would Harm Cities and Their Residents 14

1. Cities' Ability To Provide Services Would Be Impaired 14

2. The Burden of Redistricting Would Be Massive and Disruptive 17

C. Districting Based on Voting Population Would Deny Voters in Cities Equal Representation. 18

D. Districting Based On Voting Population Would Deny Nonvoters in Cities Equal Representation 20

II. EQUAL REPRESENTATION IS THE FUNDAMENTAL PRINCIPLE OF OUR GOVERNMENT AND IS REQUIRED BY THE CONSTITUTION. 23

A. The Founders Recognized The Right Of All People—Not Merely Voters—To Equal Representation 25

B. The Fourteenth Amendment Reaffirmed the Right of All People—Not Merely Voters—To Equal Representation 28

C. Historical Developments Have Not Nullified the Constitution's Principle of Equal Representation 31

D. This Court's Reapportionment Cases Did Not Elevate Electoral Equality Over Representational Equality. 36

CONCLUSION 39

Table of Authorities

Page(s)

Federal Cases

Baker v. *Carr*,
369 U.S. 186 (1962) 6, 7, 23, 36

Bd. of Estimate v. *Morris*,
489 U.S. 688 (1989) 37

Bernal v. *Fainter*,
467 U.S. 216 (1984) 21

Burns v. *Richardson*,
384 U.S. 73 (1966) 37

Davis v. *Bandemer*,
478 U.S. 109 (1986) 24

Eastern R.R. Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S 127 (1961) 20

Garza v. *Cty. of Los Angeles*,
918 F.2d 763 (9th Cir. 1990) 1, 2, 24

Gray v. *Sanders*,
372 U.S. 368 (1963) 7

Holt Civic Club v. *Tuscaloosa*,
439 U.S. 60 (1978) 14

Maryland Comm. for Fair Representation v. *Tawes*,
377 U.S. 656 (1964) 7

Nyquist v. *Mauclet*,
432 U.S. 1 (1977) 21

Plyler v. *Doe*,
457 U.S. 202 (1982) 21

Pope v. *Williams*,
193 U.S. 621 (1904) 33

Reynolds v. *Sims*,
377 U.S. 533 (1964) ..... *passim*

Richardson v. *Ramirez*,
418 U.S. 24 (1974) 29

Shaw v. *Reno*,
509 U.S. 630 (1993) 24

Tinker v. *Des Moines Indep. Cmty. Sch. Dist.*,
393 U.S. 503 (1969) 21

Wesberry v. *Sanders*,
376 U.S. 1 (1964) 27, 28

Yick Wo v. *Hopkins*,
118 U.S. 356 (1886) 21, 29

State Cases

Applewhite v. *Accuhealth, Inc.*,
21 N.Y.3d 420 (2013) 14

Calderon v. *City of Los Angeles*,
481 P.2d 489 (Cal. 1971) 1, 2, 37

In the Interest of J.F.C.,
96 S.W.3d 256 (Tex. 2002) 21

S. Burlington Cty. NAACP v. *Mt. Laurel*,
67 N.J. 151 (1975) 14

Serrano v. *Priest*,
5 Cal. 3d 584 (1971) 21

Statutes

42 U.S.C. § 1395dd 22

Americans with Disabilities Act,
42 U.S.C. § 126 22

CAL. CONST. art. 2, § 4 12

Cal. Welfare & Institutions Code § 5000
et. seq. 22

Cal. Welfare & Institutions Code § 14007.5 22

Cal. Welfare & Institutions Code § 17000 22

The Water Quality, Supply and
Infrastructure Improvement Act of 2014,
2014 Cal AB 1471 17

Other Authorities

3 RECORDS OF THE FEDERAL CONVENTION OF
1787 (Farrand ed. 1911) 28

Akhil Reed Amar, *Philadelphia Revisited:*
Amending the Constitution Outside
Article V, 55 U. Chi. L. Rev. 1043 (1988) 26

Alexander Keyssar, THE RIGHT TO VOTE
(2000) 24

American Civil Liberties Union, *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States* (September 2013). 13

American Civil Liberties Union, *Criminal Re-enfranchisement Laws*, https://www.aclu.org/map/state-criminal-re-enfranchisement-laws-map 34

Ana Swanson, *How so many of the world's people live in so little of its space*, Washington Post (Sept. 3, 2015)..... 10

Task Force for Faith-Based & Community Initiatives, *Federal Funding and Services for Prisoner Reentry*, U.S. Department of Justice, http://www.justice.gov/archive/fbci/docs/fed-prisoner-reentry-resources.pdf..... 22

California Employment Development Department, *Directive: Federal Bonding Program* (Jan. 26, 2010)..... 22

California HealthCare Foundation, *Mental Health in California: Painting a Picture*, CALIFORNIA HEALTH CARE ALMANAC (July 2013). 12

California Secretary of State, *Statement of Vote: June 3, 2014 Statewide Direct Primary Election*, http://elections.cdn.sos.ca.gov/sov/2014-primary/pdf/2014-complete-sov.pdf..... 36

California Secretary of State, *Voting Rights for Californians with Criminal Convictions or Detained in Jail or Prison*, http://www.sos.ca.gov/elections/voting-resources/new-voters/who-can-vote-california/voting-rights-californians 13

California State Legislature, www.legislature.ca.gov/ 17

Chris Nichols, *Battle Lines Drawn Over State Water Bond*, San Diego Union Tribune (Oct. 18, 2014) 17

Cong. Globe, 39th Cong., First Sess. 141 (1866) 32

Cong. Globe, 39th Cong., First Sess. 2767 (1866) 30, 32

Constitutional Rights Foundation, *Who Voted in Early America?*, Bill of Rights in Action (Fall/Winter 1991) 26

David Ely, *LA Council District Deviations* (Summer/Fall 2015) .....*passim*

Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 Ariz. St. L.J. 1237 (2012) 34

Editorial, *A Better Option for the Mentally Ill*, Washington Post (July 25, 2015). 13

Foreign-Born Population in the United States, AMERICAN COMMUNITY SURVEY REPORTS (May 2012) 9

Gayle Olson-Raymer, *California's Water Policies: Who controls, distributes, and consumes this scarce resource?*, http://users.humboldt.edu/ogayle/hist383/Water.html 16

Gordon E. Baker, RURAL VERSUS URBAN POLITICAL POWER: THE NATURE AND CONSEQUENCES OF UNBALANCED REPRESENTATION (1955) 15

Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391 (1993) 33

Jens Manuel Krogstad & Jeffrey S. Passell, *5 Facts About Illegal Immigration in the U.S.* Pew Research Center (July 24, 2015) 9

John Hart Ely, DEMOCRACY AND DISTRUST (1980) 25, 26, 33

John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 Yale L.J. 163 (1984) 35

Jon Mooallem, *You Just Got Out of Prison. Now What?*, N.Y. Times (July 16, 2015) 13

Joseph Fishkin, *Weightless Votes*, 121 Yale L.J. 1888 (2012) 5

Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Policy Institute (February 26, 2015) 9

Kimberly Leonard, *Keeping the Mentally Incompetent from Voting*, The Atlantic (Oct. 17, 2012) 34

Letter to Joseph Hawley (Aug. 25, 1776), quoted in C. James Taylor, ed., FOUNDING FAMILIES: DIGITAL EDITIONS OF THE PAPERS OF THE WINTHROPS AND THE ADAMSES (2015) 3, 26

Lindsey A. Powers, *Takoma Park Grants 16-Year-Olds Right to Vote*, Washington Post (May 14, 2013) 34

Mapping L.A.: Foreign Born, L.A. Times, http://maps.latimes.com/neighborhoods/foreign-born/neighborhood/list/ 12

Matt Hamilton & Rubin Vines, *In a First for California, Immigrants Here Illegally Get Seats in City Government*, L.A. Times (Aug. 3, 2015) 22

National Conference of State Legislators, *States Offering Driver's Licenses to Immigrants* (July 8, 2015) 22

National Conference of State Legislatures, *Voting by Nonresidents and Noncitizens* (February 27, 2015) 34

Note, *Reapportionment*, 79 Harv. L. Rev. 1226 (1966) 15

Patrick McGreevy, *L.A.'s Low Voter Numbers Push State Officials Toward Easing Process*, L.A. Times (March 14, 2015) 35

Press Release, Assemblymember Anthony Rendon, *Assembly Water Bond Working Group Completes Its Work on New State Water Bond* (Sept. 11, 2013) 17

Press Release, California Secretary of State Alex Padilla, *Secretary Padilla Ends Appeal of Scott v. Bowen Case* (Aug. 4, 2015). 35

Project on Fair Representation, *Our Cases*, https://www.projectonfairrepresentation.org/cases/ 8

Richard Briffault, *Legal History: The Contested Right to Vote*, 100 Mich. L. Rev. 1506 (2002) 26

Richard Florida, *Where Kids Live Now in the U.S.*, CityLab (April 13, 2015) 11

Scott Olson, *Study: Urban Tax Money Subsidizes Rural Counties*, Indianapolis Business Journal (Jan. 12, 2010) 19

Tamata Audi, *Los Angeles Warns About Parolee Risks*, Wall Street Journal (October 4, 2011) 13

Task Force for Faith-Based & Community Initiatives, *Federal Funding and Services for Prisoner Reentry*, U.S. Department of Justice, http://www.justice.gov/archive/fbci/docs/fed-prisoner-reentry-resources.pdf 22

THE FEDERALIST No. 54 (James Madison) 27, 28

Thomas Jefferson, Letter to William King (1819), Jefferson Papers, Library of Congress, Vol. 216 25

U.S. Census Bureau, State and County QuickFacts, http://quickfacts.census.gov 9, 10, 11

U.S. Census Bureau, American FactFinder, Nativity and Citizenship Status in the United States: 2014 American Community Survey 1-Year Estimates, http://factfinder.census.gov 10

U.S. CONST., art. 1 26

U.S. CONST., amend. xiv 28

Vivian E. Hamilton, *Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority*, 77 Brooklyn L. Rev. 1447 (2012) 34

Where is L.A.'s urgency in the homelessness crisis?, L.A. Times (June 21, 2015). 12

INTEREST OF *AMICI CURIAE*

The City and County of Los Angeles, joined by other cities across the United States, file this brief as *amici curiae* in support of Appellees.[1] Los Angeles and the other *amici* fully embrace the use of total population as the base for redistricting.

For over 40 years, Los Angeles has dealt first-hand with the precise redistricting question presented here. Recent demographic shifts affected Los Angeles earlier than some other localities, bringing the question to a head decades before it became a concern elsewhere.

In *Calderon* v. *City of Los Angeles*, 481 P.2d 489 (Cal. 1971), Los Angeles residents challenged the city's councilmanic district map, arguing for total-population apportionment. Twenty years later, in *Garza* v. *County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991), Hispanic residents of Los Angeles County challenged the districting plan for the County Board of Supervisors, also arguing for apportionment based on total population. The City and the County defended

---

[1] Pursuant to Sup. Ct. R. 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their employees, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from both parties consenting to the filing of *amicus curiae* briefs in support of either party have been filed with the Clerk of the Court.

these cases, arguing for districting based on *voting* population, but both times the courts rightly held that redistricting must be based on *total* population. California's Supreme Court held in *Calderon* that the Fourteenth Amendment requires "[a]dherence to a population standard." 481 P.2d at 493. The Ninth Circuit in *Garza* held that apportionment "must be made upon the basis of population" if "government [is to] represent *all* the people." *Id.* at 774 (emphasis in original).

The City and County endorse the wisdom of *Calderon* and *Garza* and, based on their decades of experience with the rule of those cases, believe they are uniquely situated to comment on the "eligible voter" rule that Appellants would have the Court impose nationwide. If Appellants prevail, *all* residents of urban areas like Los Angeles—voters and nonvoters—would suffer diminished representation in state government and disproportionate strains on already-limited local resources in the very places where they are most urgently needed. Appellants' rule would harm cities and city-dwellers across the nation and violate the Constitution's promise that *all* persons—not merely voters—are entitled to equal protection of the laws.

SUMMARY OF ARGUMENT

> Equality of representation in the Legislature, is a first Principle of Liberty, and the Moment, the least departure from such Equality takes Place, that Moment an Inroad is made upon Liberty.

John Adams, 1776[2]

* * *

As the Founders proclaimed, and as this Court has held, the bedrock principle of our political order is "[e]quality of representation." That principle is honored when districts contain equal numbers of residents. Elected officials represent *all* residents of their districts—not merely those who voted for them, or those who cast a ballot. All persons receive equal representation by those duty-bound to represent them only where districts are equal in population.

Appellants see things differently. In their view, adherence to the equal-representation principle is not only non-obligatory, but *unconstitutional*. As they would have it, the Constitution mandates a system in which elected officials in the same body represent sharply divergent numbers of constituents, depending on how many of those constituents happen to be eligible to vote.

As *amici* explain in Part I of this brief, Appellants' eligible-voters rule would harm those that the

---

[2] Letter to Joseph Hawley (Aug. 25, 1776), quoted in C. James Taylor, ed., FOUNDING FAMILIES: DIGITAL EDITIONS OF THE PAPERS OF THE WINTHROPS AND THE ADAMSES (2015).

"reapportionment revolution" was meant to help: cities and large urban areas, and their residents—both voters and nonvoters. Because cities almost always have higher concentrations of non-voters than rural areas, a nationwide shift to an "eligible voters" rule would leave cities and their residents with less *per capita* representation than rural areas. As a result, cities would be systematically disadvantaged in the competition for state resources necessary to provide for their residents' basic needs. Moreover, city-dwellers—both voters and nonvoters—would suffer diminished access to, and attention from, their state representatives, and would suffer similarly diminished access to already-strained city services. This denial of equal representation is only exacerbated by the exorbitant costs and practical difficulties of redistricting urban areas to equalize voting population—a mandate that would inevitably result in districts with wildly divergent total populations, convoluted boundaries that fail to preserve communities of interest or other traditional redistricting criteria, or both.

As *amici* explain in Part II, this denial of equal representation would violate the Constitution's clear command. The Founding Fathers were in accord that *all* of "the People" must be included in the representation base, both voters and nonvoters. They believed that all people were entitled to the right to representation in the legislature, even though the right to vote was sharply limited. In other words, they endorsed the concept of "virtual representation," whereby those who were enfranchised cast their ballots as "Electors" on behalf of the broader "People." The Fourteenth Amendment's drafters expressly reaffirmed the Founders' concept of virtual

representation and rejected Appellants' eligible-voters rule—with full knowledge that nonvoters were distributed unevenly throughout the country.

Today, voter turnout is abysmally low: in the single digits in some local elections, and consistently below 50% in all but presidential elections. Our leaders nevertheless are legitimately elected because voters vote as "virtual representatives" on behalf of *everyone* in their district or state—not just the registered voters who do not vote, but all of "the People," voters and non-voters alike. In this way, all obtain equal representation in their legislative bodies, as the Equal Protection Clause and this Court's reapportionment decisions demand.

ARGUMENT

I. REDISTRICTING BASED ON ELIGIBLE VOTERS WOULD HARM AMERICA'S CITIES AND DENY EQUAL REPRESENTATION TO THEIR RESIDENTS, BOTH VOTERS AND NONVOTERS.

Redistricting is a zero sum game. If one part of a state wins more legislators, another part loses. Basing redistricting on voters (whether eligible, registered, or actual) rather than total population would make the nation's cities and large urban areas the losers. *See* Joseph Fishkin, *Weightless Votes*, 121 Yale L.J. 1888, 1890-91 (2012) ("A shift from total population to eligible voters . . would shift power markedly . . . away from cities").

This is because cities almost always have higher concentrations of nonvoter residents than rural areas. Cities are magnets for immigrants, who are drawn to large urban areas to build new lives in this

country. Cities also often have disproportionate numbers of other nonvoters: children, mentally incapacitated persons, and felons. If this Court orders states to redistrict their legislatures using voting population as a basis, *amici* would see their power in their state legislatures diminished. Residents in less-populated rural areas would obtain more representation in state government than their population warrants, while urban residents—both voters and non-voters—would be deprived of representation proportionate to their population.

Appellants do not dispute this. Instead, they argue that the Constitution elevates another value—equal "weighting" of all eligible voters' votes—above equality of representation. As Appellants see it, equality of representation might be nice, but when forced to choose the Constitution requires states to create districts of equal size based on voters rather than persons. If there are two districts of equal population and one has twice the eligible voters of the other, then that district is required to have twice the representatives. And it is just tough luck if that means urban areas wind up with fewer representatives and rural areas get more.

This would be a reversal of history. The reapportionment cases that resulted in the "one person, one vote" principle were largely brought on behalf of cities to *reverse* the pronounced rural bias that had infected many state governments. In *Baker* v. *Carr*, 369 U.S. 186 (1962), for example, plaintiff cities Knoxville, Chattanooga, and Nashville complained of "discriminat[ion]" against Tennessee's urban areas "in the distribution of school and highway-improvement funds," *id.* at 271, 275 (Harlan, J., dissenting), as a result of the "wide . . disparity" in representation

"between rural and urban" areas, *id.* at 256 (Clark, J., concurring). In *Reynolds* v. *Sims*, 377 U.S. 533 (1964), residents of Jefferson County, Alabama—the home of Birmingham, the state's largest city—complained that Jefferson County, with a population of 600,000 people, had only one senator, the same as Lowndes County (population 15,417) and Wilcox County (population 18,739). *Id.* at 545-46; *see also Gray* v. *Sanders*, 372 U.S. 368, 379 (1963) ("Georgia . . . weights the rural vote more heavily than the urban vote"); *Maryland Comm. for Fair Representation* v. *Tawes*, 377 U.S. 656, 674 n.19 (1964) (noting a "rural strangle hold on the [state] legislature").

Reynolds changed all that. It held that the "fundamental principle of representative government in this country is one of equal representation for equal numbers of people." 377 U.S. at 560-61. It is "a bedrock of our political system" that legislatures must be "representative of the people." *Id.* at 562. They must represent all of the people "without regard to race, sex, economic status, or place of residence within a State," *id.* at 561—a telling observation, since in 1964 most of Birmingham's black residents could not vote. All the "people" of Alabama's largest city, voters and nonvoters, were entitled to representation commensurate with their numbers.

Thus, the reapportionment revolution began. The command that legislatures be truly "representative of the people" caused a dramatic shift of power away from sparsely populated rural areas and towards the nation's great population centers. As *Reynolds* observed, "[l]egislators represent people, not trees or acres." *Id.* at 562.

Appellants would reverse field. They would replace the principle of representational equality—used since *Reynolds*, in one form or another, by all the States—with an inflexible command of "electoral equality." That rule would cripple *amici*'s ability to provide the services that their residents require, and would deny equal representation to all of their residents—voters *and* nonvoters.

A. Cities and Large Urban Areas Have Higher Concentrations of People Ineligible To Vote.

Cities and large urban areas have a greater proportion of nonvoters largely as a result of immigration patterns, but also because of differing concentrations of children, mentally incapacitated persons, and convicted felons.

1. Non-Citizens

This case is driven, in significant part, by concern about immigration. The issue is unstated in Appellants' brief, but their suit is spearheaded by a group that specializes in "challeng[ing] racial and ethnic classifications and preferences." Project on Fair Representation, *Our Cases*, https://www.projectonfairrepresentation.org/cases/. Their *amici* openly express concern about the "influx of non-citizens in[to] urban areas," Brief of *Amicus Curiae* Eagle Forum at 2, and the "harms" they supposedly cause, Brief of *Amicus Curiae* Immigration Reform Law Institute at 1-2, 8.

Immigration policy is the prerogative of Congress and the President, and reasonable parties continue to

debate the issue. *Amici* offer no views here on immigration policy.

Not open to debate, however, is that cities have always attracted a larger percentage of resident immigrants. Forty million foreign-born persons live in the United States: 18 million are naturalized citizens; 11 million are legal residents, many on the path to citizenship; and another 11 million are undocumented.[3] Foreign-Born Population in the United States, AMERICAN COMMUNITY SURVEY REPORTS (May 2012); Jens Manuel Krogstad & Jeffrey S. Passell, *5 Facts About Illegal Immigration in the U.S.*, Pew Research Center (July 24, 2015).

The vast majority of these immigrants reside in cities and large urban areas. For example, although only 11% of U.S. residents are foreign born, of the 10 million people in Los Angeles County, 3.5 million (35%) are foreign born. U.S. Census Bureau, State and County QuickFacts, http://quickfacts.census.gov (hereinafter *Census Quickfacts*). That's more foreign-born residents in Los Angeles County than there are *total* residents in the cities of Houston and San Diego combined. *Id.* Of the 4 million people in the City of

---

[3] Some of the statistics in this brief relate to foreign-born residents, rather than those who are, or are not, citizens. That is how the U.S. Census collects information and so it is often the best data available. As a rule of thumb, half of foreign-born residents (actually 53%) are not citizens. *See* Jie Zong & Jeanne Batalova, *Frequently Requested Statistics on Immigrants and Immigration in the United States*, Migration Policy Institute (February 26, 2015).

Los Angeles, 1.5 million (38.8%) are foreign born—equal to the population of Philadelphia. *Id.*[4]

The concentration of foreign-born residents in cities and urban areas is almost always greater—sometimes vastly greater—than the concentration in the rest of the states in which they are situated. For example, with 15 million residents, *amici* Los Angeles County and Cook County are the two largest counties in the United States, comprising about 5% of the U.S. population, more than the total population of the 13 smallest states. Ana Swanson, *How so many of the world's people live in so little of its space*, Wash. Post (Sept. 3, 2015). Los Angeles County's 35% foreign born compares to just 24% in the rest of California. *Census QuickFacts*. Cook County's 21% foreign born compares to just 8.8% in the rest of Illinois.[5] *Id.*

Moreover, within a given city, non-citizens are not equally dispersed across districts and neighborhoods.

---

[4] This pattern repeats itself again and again among the nation's cities and large urban areas. The top ten major cities in terms of foreign-born residents (excluding Los Angeles) are: Miami (57.7%); San Jose (38.6%); New York (37%); San Francisco (35.6%); Houston (28.3%); Oakland (27%); San Diego (26.2%); Long Beach (26%); El Paso (25%); Dallas (24.4%). *Census QuickFacts*.

[5] About 17.6% of people in Los Angeles County are non-citizens, compared to 12.5% in the rest of California. About 10.6% of people in Cook County are non-citizens compared to 4.5% in the rest of Illinois. U.S. Census Bureau, American FactFinder, Nativity and Citizenship Status in the United States: 2014 American Community Survey 1-Year Estimates, http://factfinder.census.gov (hereinafter *American Community Survey*).

For example, in Los Angeles' Council District 9, 50% of residents over 18 are non-citizens, compared with just 13.9% in District 5. David Ely, *LA Council District Deviations* (Summer/Fall 2015) (on file with Los Angeles City Attorney's Office).

In Appellants' view, the Constitution commands that these non-citizen immigrant populations—even those lawfully here and on the path to citizenship—be disregarded when determining how state and local district lines are drawn and representation is allotted.

2. Children

By far the largest group ineligible to vote is not immigrants, but young people under age 18. There are about 74 million children in the United States. *Census QuickFacts*.

The distribution of children is not uniform across the nation. Although the pattern is more variable than it is for immigrants, cities may have greater concentrations of children than surrounding rural areas. For example, although 23% of the U.S. population is under 18, in Texas, whose redistricting plan is at issue here, close to 28% of the population is under 18 in the metropolitan areas of Houston and Dallas. *Census Quickfacts*; Richard Florida, *Where Kids Live Now in the U.S.*, CityLab (April 13, 2015).

The presence of children can also fluctuate *within* cities. In Los Angeles, for example, 32% of the population of the city's Council District 9 is under age 18, compared with just 15% of Council District 5. Ely, *LA Council District Deviations*, *supra*. The population of Los Angeles' Adams-Normandie neighborhood is 40% under age 18, compared with

just 19% of its Silver Lake neighborhood. *See Mapping L.A.: Foreign Born*, L.A. Times, http://maps.latimes.com/neighborhoods/foreign-born/neighborhood/list/.

Almost all of the nation's 74 million persons under 18 are citizens, *American Community Survey*, *supra*, and many are actively engaged in the political process. As Appellants would have it, the Constitution bars them from being counted when drawing district lines, even though the representatives elected from those districts will have much to say about their futures.

3. Mentally Incapacitated Persons

Many states, including California, provide for the disqualification of voters while mentally incompetent. CAL. CONST. art. 2, § 4. While the number of persons disqualified for mental incompetence is not large, and good data is not readily available, there is reason to believe that such persons live disproportionately in cities.

For example, homeless populations tend to have much higher rates of mental illness: 25%, compared to 4.6% of the general population. California HealthCare Foundation, *Mental Health in California: Painting a Picture*, CALIFORNIA HEALTH CARE ALMANAC (July 2013). Homeless people are much more likely to live in cities than rural areas. For instance, Los Angeles now faces a homelessness crisis: in just two years there has been a 12% increase in the number of homeless people, from 39,461 in 2013 to 44,359 this year. *Where is L.A.'s urgency in the homelessness crisis?*, L.A. Times (June

21, 2015). Meanwhile, local jails in Los Angeles are now among the country's largest *de facto* mental institutions. Editorial, *A Better Option for the Mentally Ill*, Wash. Post (July 25, 2015).

In Appellants' view, the Constitution forbids Los Angeles from counting these citizens when legislative districts are drawn simply because they are disabled, usually through no fault of their own.

4. Disenfranchised Felons

Convicted felons on parole are not eligible to vote in many states, including California. California Secretary of State, *Voting Rights for Californians with Criminal Convictions or Detained in Jail or Prison*, http://www.sos.ca.gov/elections/voting-resources/new-voters/who-can-vote-california/voting-rights-californians. In other states, convicted felons under mandatory supervision or post-release community supervision may not vote. In some jurisdictions, convicted felons are disenfranchised indefinitely. *See* American Civil Liberties Union, *Democracy Imprisoned: A Review of the Prevalence and Impact of Felony Disenfranchisement Laws in the United States*, 4-5, 12 (September 2013).

Newly released convicts often gravitate toward cities in search of housing, job training, drug treatment, and other re-entry programs. *See* Jon Mooallem, *You Just Got Out of Prison. Now What?*, N.Y. Times (July 16, 2015). At any given time, the number of parolees in Los Angeles City is between 25,000 and 50,000. *See* Tamata Audi, *Los Angeles Warns About Parolee Risks*, Wall Street Journal (October 4, 2011) (Los Angeles County's 500 probation officers have caseloads of 50 to 100 parolees per officer).

B. Districting Based on Voting Population Would Harm Cities and Their Residents.

1. Cities' Ability To Provide Services Would Be Impaired.

As was true in *Reynolds*, a redistricting plan that ignores wide swaths of the population and that does not provide equal representation for all the people harms areas where the disfavored population resides. Now, as then, the nation's cities and large urban areas are in the crosshairs. Cities need representation commensurate with their population in order to provide the services, and secure the resources, that their residents require.

Los Angeles and the other *amici* provide a host of services to their residents. These include police and fire departments, sanitation services, health services, local schools, roads, and many others. Such services are the core responsibility of city and county governments. *See, e.g.*, *Holt Civic Club* v. *Tuscaloosa*, 439 U.S. 60, 74 (1978) ("police, fire, and health protection" are "basic municipal services" whose delivery is a "city's responsibility"); *Applewhite* v. *Accuhealth, Inc.*, 21 N.Y.3d 420, 427 (2013) ("[P]rotecting health and safety is one of municipal government's most important duties and this responsibility extends to the duty to provide police protection, fire protection or ambulance service to the general public." (internal citations and quotation marks omitted)); *S. Burlington Cty. NAACP* v. *Mt. Laurel*, 67 N.J. 151, 173 (1975) ("governmental services" such as "education, health, police, fire, housing and the like" are "necessary to the very existence of safe and decent city life").

Most of the services that *amici* provide to their residents are unrelated to whether the resident is a voter. The police respond to any call for help. Firefighters do not ask for a voter identification card before fighting a fire. Disease does not discriminate based on voting status. All residents travel on the highways and expect their garbage to be picked up. Meanwhile, the presence of nonvoters requires additional services directed to them. Cities must provide children with schooling, vaccinations and pediatric public health care. Mentally incapacitated residents need housing, food and medical care. Felons require rehabilitative services, and nearby residents often demand additional public safety resources.

This all takes money and support from the state government. That, in turn, requires cities and large urban areas to have representation in their state capitals commensurate with their total population—not just the portion of their population eligible to cast a ballot. Appellants do not seriously dispute this proposition; they just argue it does not matter.

The harm caused by the denial of equal representation to the residents of cities and large urban areas in the pre-*Reynolds* era is well documented. Before *Reynolds*, rural-dominated legislatures left cities "starved for necessary funds" and unable to respond to the demands of "a modern industrialized age." Gordon E. Baker, RURAL VERSUS URBAN POLITICAL POWER: THE NATURE AND CONSEQUENCES OF UNBALANCED REPRESENTATION (1955) vi, 3; *see* Note, *Reapportionment*, 79 Harv. L. Rev. 1226, 1240 (1966) (noting "rural-backed defeats of minimum wage laws, discrimination against urban

areas in the allocation of state tax funds for schools and roads, denial of home-rule powers of taxation and licensing, and general failure to provide aid for metropolitan problems").

Reynolds and its progeny have largely eliminated those inequities. In implementing the "one person, one vote" rule, the states—with only slight variations—have universally redistricted to provide equal numbers of representatives for equal numbers of people. Today, *amici* and other cities across the United States have representation in their state legislatures commensurate with their populations, and thus the ability to ensure that their residents' needs do not systematically go unmet.

One timely example involves the fair allocation of water within the state of California—by all rights, a question unrelated to who is eligible to vote. Battle lines over water in California have long been drawn between the water-rich north and the populous south. *See* Gayle Olson-Raymer, *California's Water Policies: Who controls, distributes, and consumes this scarce resource?*, http://users.humboldt.edu/ogayle/hist383/Water.html (75% of California's water originates in the northern third of the state, while 80% of water demand is in the southern two-thirds of the state). Over the past four years a record-setting drought has caused the issue to reach crisis proportions, threatening a battle between the haves and the have-nots.

Because Los Angeles County has representation in the state legislature commensurate with its vast population, it has been able to protect the interests of its residents. Twenty-four (of 80) California

Assembly members are from Los Angeles County, as well as 11 (of 40) state senators, giving the County substantial representation in the state government. *See* California State Legislature, www.legislature.ca.gov/. In 2013, a water bond working group spearheaded by two Los Angeles representatives led to passage of The Water Quality, Supply and Infrastructure Improvement Act of 2014, which, among other things, provided for the investment of more than $100 million for regional water security to the Los Angeles area. 2014 Cal AB 1471; *see also* Press Release, Assemblymember Anthony Rendon, *Assembly Water Bond Working Group Completes Its Work on New State Water Bond* (Sept. 11, 2013); Chris Nichols, *Battle Lines Drawn Over State Water Bond*, San Diego Union Tribune (Oct. 18, 2014). The law is a key part of California's fight against the drought, based on sharing a vital resource according to the needs of the total population.

2. The Burden of Redistricting Would Be Massive and Disruptive.

The burden of complying with Appellants' voter-based districting rule would be almost insurmountable. Redistricting necessitates a lengthy, expensive process costing millions of dollars for each jurisdiction. Moreover, redrawing districts to equalize *both* voters *and* persons is practically impossible in cities and large urban areas. For example, the City of Los Angeles' most recent redistricting effort achieved a 5% population deviation among its councilmanic districts, well within the constitutionally acceptable limit. But the variation in the citizen voting age population across

districts is as much as 74%. Ely, *LA Council Districting Deviations*, *supra*. Redistricting to equalize citizen voting age population would yield wildly divergent populations across districts: under one technically plausible computer model, the largest district would have a population of 360,000 while the smallest district would have a population of 200,000.

Redistricting based on voting population would also be all but impossible without violating all traditional notions of fair districting, such as compactness, contiguity and adherence to existing political subdivisions, and without jeopardizing minority voters' ability to elect candidates of their choice. That computers might be able to draw unrecognizably gerrymandered "districts" that balance total population and voting population is no answer to these problems. A full discussion of these issues is beyond the scope of this brief, but *see generally* Brief of *Amicus Curiae* Nathaniel Persily *et al.*; Brief of *Amicus Curiae* Texas Senate Hispanic Caucus *et al.*; Brief of Appellees at 54-57.

C. Districting Based on Voting Population Would Deny Voters in Cities Equal Representation.

Appellants argue that voters are entitled to a privileged position vis-à-vis nonvoters in the redistricting process. Lost in this debate are the *voters* who live in districts with large nonvoting populations. Creating districts based on voters alone would deny equal representation to the *voters* of cities and large urban areas "merely because of where they happen to reside." *Reynolds*, 377 U.S. at 563.

The math is undeniable. In Appellants' view, a hypothetical rural district with 100 voters and a total population (including children) of 125 gets one representative; an urban district with 100 voters and a population of 200 (including immigrants, children, *et al.*) also gets one representative. Like the residents of Birmingham in *Reynolds*, the urban voter's voice in government is diminished and the ability to have his or her views considered is constricted. That is the opposite of *Reynolds'* promise of "equal representation for equal numbers of people." 377 U.S. at 559-60.

Why should the voters of the City and County of Los Angeles, and of the other *amici* cities and counties, be forced to return to a world where rural voters hold undue power in their state legislatures and deny urban areas the resources they need? Little about the services that cities must provide depends upon whether a resident is a voter. Nor is there any reason to penalize a citizen for choosing to live (or being born) in an urban area surrounded by large numbers of non-voters. Indeed, voters in cities and urban areas tend to pay more in taxes than their rural counterparts. *See, e.g.*, Scott Olson, *Study: Urban Tax Money Subsidizes Rural Counties*, Indianapolis Business Journal (Jan. 12, 2010). They should have a right to expect equal representation in their state government.

Appellants' rule would also shortchange urban voters' First Amendment right to petition their government for the redress of grievances. By decreasing the number of officials representing cities relative to less populated parts of the state, Appellants' rule would make it more difficult for

urban voters to communicate with their representatives and have their voices heard. Because "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives," *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961), this would rob urban voters of equal representation.

D. Districting Based On Voting Population Would Deny Nonvoters in Cities Equal Representation.

Appellants insist that the Constitution forbids equality of representation for nonvoters, at least to the extent that such a goal conflicts with legislative districts containing equal numbers of voters. It is thus no surprise that such a rule would, in fact, deny urban nonvoters equal representation compared with residents of rural areas. Indeed, urban nonvoters would even get less per capita representation than *rural* nonvoters.

With regard to the need for representation in government, voters and nonvoters stand on almost identical ground. Most laws apply equally to all residents, both voters and nonvoters, and all residents have an interest in such laws. Meanwhile, *amici* owe services and protection to nonvoters on a virtually equal basis with voters, and nonvoters have an interest in receiving those services. Separately, nonvoters have substantial legal rights and interests under both federal and state law that they are entitled to have their legislators consider. Recognizing all of this, the Equal Protection Clause protects all "person[s] within [a state's] jurisdiction,"

not just citizens or voters. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886) (non-citizen immigrants are "persons" entitled to equal protection within meaning of Fourteenth Amendment).

Although the specific rights accorded to nonvoters are too many to list here, we mention a few:

Children are protected by many laws. For example, under the laws of every state, the 74 million American children and young adults under 18 have, *inter alia*, a right to education, a right to a safe environment, and a right to political expression.[6]

Except for the right to vote or hold a sensitive public office, the 11 million immigrants lawfully present in this country have rights and obligations virtually identical to those of full-blown citizens, including the right to participate in the political process.[7] Even undocumented immigrants have

---

[6] *See, e.g.*, *Serrano* v. *Priest*, 5 Cal. 3d 584 (1971) (education); *In the Interest of J.F.C.*, 96 S.W.3d 256, 304 (Tex. 2002) (safe environment); *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511-13 (1969) (political expression). The right to a free public education extends to minor undocumented immigrants, just like all other children. *Plyler* v. *Doe*, 457 U.S. 202 (1982).

[7] *See Bernal* v. *Fainter*, 467 U.S. 216 (1984) (striking down law that denied non-citizen immigrants right to become notaries public and thereby assist in litigation for benefit of migrant workers); *Nyquist* v. *Mauclet*, 432 U.S. 1 (1977) (holding that state's interest in educating its electorate does not justify excluding aliens from scholarship program, since non-citizens may participate in their communities in ways short of voting).

rights under both federal and state law, such as the right to emergency medical services from publicly funded hospitals.[8]

There are also laws protecting the rights of mentally incapacitated persons and felons. Mentally incapacitated persons have, *inter alia*, a right to treatment, a right to refuse treatment, and a right to be free from discrimination.[9] The rights accorded to felons include the right to re-entry services and access to programs designed to encourage employers to hire those recently released from prison.[10]

---

[8] 42 U.S.C. § 1395dd; *see also* Cal. Welfare & Institutions Code §§ 14007.5, 17000. In 12 states, including California, undocumented immigrants are entitled to drivers' licenses. National Conference of State Legislators, *States Offering Driver's Licenses to Immigrants* (July 8, 2015). Some jurisdictions permit undocumented immigrants to hold certain public offices. Matt Hamilton & Rubin Vines, *In a First for California, Immigrants Here Illegally Get Seats in City Government*, L.A. Times (Aug. 3, 2015).

[9] *See, e.g.*, Cal. Welfare & Institutions Code § 5000 et. seq. (treatment and refusal of treatment); Americans with Disabilities Act, 42 U.S.C. § 126 (freedom from discrimination).

[10] *See, e.g.*, Task Force for Faith-Based & Community Initiatives, *Federal Funding and Services for Prisoner Reentry*, U.S. Department of Justice, http://www.justice.gov/archive/fbci/docs/fed-prisoner-reentry-resources.pdf; California Employment Development Department, *Directive: Federal Bonding Program* (Jan. 26, 2010).

All of this is not to argue on behalf of more or fewer rights for nonvoters. On that issue, *amici* take no position. But it is undeniably true that nonvoters are very much a part of the political community and the political process. As a result, they have a fundamental interest in being represented in their state and local legislative bodies. Just as it is a denial of equal protection to force *voters* in cities and large urban areas to accept fewer representatives than those allocated to rural districts of equal population, it is a denial of the same principle to impose the same burden on *nonvoters* living in the same city.

II. EQUAL REPRESENTATION IS THE FUNDAMENTAL PRINCIPLE OF OUR GOVERNMENT AND IS REQUIRED BY THE CONSTITUTION.

Appellants frame this case as a battle between "representational equality" (*i.e.*, equal representation for equal numbers of people) and "electoral equality" (*i.e.*, equal "weight" for all ballots cast). They read certain passages of *Baker* and *Reynolds* as favoring electoral equality over representational equality. But the text of the Constitution, and over two centuries of history, forecloses their tendentious reading of those cases.

Representational equality is the bedrock of our republican form of government. Our Founders waged a revolution under the banner "No Taxation Without *Representation*." Yet they created a government where a majority of people had no right to vote for their representatives. That remained true well into the 20th century. Even today, many subject to this

nation's laws are disenfranchised, and of those who are permitted to vote, few actually do.

What legitimizes the gap between the voters who actually elect our leaders and the majority of people who do not or cannot vote is the concept of "virtual representation." Those who pull the lever vote not only on their own behalf, but vicariously on behalf of their nonvoting children, friends, co-workers and neighbors. In return, the officials chosen by those who vote "represent[] all persons residing within [their] district[s], whether or not they are eligible to vote and whether or not they voted for the official in the preceding election." *Garza*, 918 F.2d at 781 n.5 (Kozinski, J., concurring in part and dissenting in part) (citing *Davis* v. *Bandemer*, 478 U.S. 109, 132 (1986)); *see also Shaw* v. *Reno*, 509 U.S. 630, 648 (1993) (elected officials are "obligat[ed]" to "represent . . . their constituency as a whole").

The term "virtual representation," which predates the American Revolution, is not free from controversy. The words were "anathema" to the founding generation, since the British invoked them to justify denying the colonies a voice in government. The colonists, the British insisted, were "virtually represented" by Parliament. *See* John Hart Ely, DEMOCRACY AND DISTRUST 82 (1980). Similarly, opponents of women's suffrage argued that women did not need the vote since they were "virtually represented" by male heads-of-household. *See* Alexander Keyssar, THE RIGHT TO VOTE 8, 138-78 (2000).

These particular arguments were rightly rejected. But the underlying concept of "virtual representation"—that the electorate votes on behalf

of the entire populace, and that the officials whom they elect represent that whole populace—"has survived in American political theory and in fact has informed our constitutional thinking from the beginning." Ely, DEMOCRACY AND DISTRUST 82.

That broader notion of "virtual representation" lies at the heart of this case. The Framers chose total population as the apportionment base for Congress because they understood that *all* persons, and not merely *voters*, are entitled to representation in government. Thereafter, in ratifying the Fourteenth Amendment, Congress again chose to use *all* persons, not just *voters*, as the apportionment base—explicitly recognizing, as remains true today, that some areas had more nonvoters than others. At the very same time, Congress enacted the Equal Protection Clause, protecting *all* persons, not just *voters*, and thus requiring the states to abide by the same principle of equal representation.

A. The Founders Recognized The Right Of All People—Not Merely Voters—To Equal Representation.

To the Founders, equal representation was a paramount value. To John Adams, "[e]quality of representation in the Legislature, [was] a first Principle of Liberty." Adams, *supra*, note 2. To Thomas Jefferson, "[e]qual representation [was] so fundamental a principle in a true republic that no prejudice [could] justify its violation . . . ." Thomas Jefferson, Letter to William King (1819), Jefferson Papers, Library of Congress, Vol. 216, p. 38616 (quoted in *Reynolds*, 377 U.S. at 573 n.53).

Yet the Founders were not advocating equal *suffrage*—far from it. At the outset, the American electorate was limited to those adult white males who satisfied varying state-imposed religious tests and property qualifications. Richard Briffault, *Legal History: The Contested Right to Vote*, 100 Mich. L. Rev. 1506, 1510 (2002). This amounted to "perhaps only 10 percent to 20 percent of the total population." Constitutional Rights Foundation, *Who Voted in Early America?*, Bill of Rights in Action (Fall/Winter 1991).

In the Founders' eyes, this was no contradiction. Those entrusted with the franchise were understood to cast their votes on behalf of the broader populace. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. Chi. L. Rev. 1043, 1075 n.117 (1988) (noting the "founding generation['s]" view that "virtual representation" enabled "the electorate" to "speak for the larger society"); Ely, DEMOCRACY AND DISTRUST 82 (similar). In return, the representatives chosen by the electorate "were expected to represent the entirety of their constituencies," and not merely the electors. *Id.* at 88.

The text of the Constitution enshrined this political view. Article I provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by *the People* of the several States, and *the Electors* in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." U.S. CONST., art. 1, § 2, cl. 1 (emphasis added). Although the Constitution thereby leaves it to each state to determine who can vote, the representatives selected

by those Electors were deemed to be "chosen . . . by," and thus obligated to represent, "the People."

For this reason, Article I requires representatives to be apportioned based upon "the whole Number of free Persons" in the State—not the number of "Electors." This formula for representation made "equal representation for equal numbers of people" the governing rule of the House of Representatives. *Wesberry* v. *Sanders*, 376 U.S. 1, 18 (1964). By permitting states to impose their own varying rules to qualify as an "Elector," while apportioning representation uniformly based on the number of "People," the Framers enshrined virtual representation in the Constitution.

In The Federalist, Madison expounded on this "fundamental principle" of the Constitution. Representatives would be apportioned based upon the "aggregate number of inhabitants" in the state, while the state would decide which particular "part of the inhabitants" would be permitted to vote for those representatives:

> It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States is to be determined by a federal rule, founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants as the State itself may designate. . . .

THE FEDERALIST No. 54 (James Madison). Madison explicitly noted that, for purposes of apportionment, "inhabitants" would include nonvoters:

> [I]n every State, a certain proportion of inhabitants are deprived of [the] right [to vote] . . . who will be included in the census by which the federal Constitution apportions the representatives.

Id.

In this way, Article I implemented the Founders' vision of equal representation for all the people. As delegate James Wilson explained, "equal numbers of people ought to have an equal n[umber] of representatives." 3 RECORDS OF THE FEDERAL CONVENTION OF 1787 (Farrand ed. 1911) 180 (quoted in *Wesberry*, 376 U.S. at 10-11).

B. The Fourteenth Amendment Reaffirmed the Right of All People—Not Merely Voters—To Equal Representation.

Of course, Article I does not directly control here, because state and local districting, and not Congressional apportionment, is at issue. Instead, this case is controlled by the Equal Protection Clause of the Fourteenth Amendment. But the text and history of the Fourteenth Amendment show that the Equal Protection Clause embodies the same principle of representational equality.

The first clause of the Fourteenth Amendment defines who qualifies as a "citizen." U.S. CONST., amend. xiv, § 1, cl. 1. The next sentence contains the Equal Protection Clause, from which "one person, one vote" springs. The Equal Protection Clause prohibits the states from "den[ying] equal protection of the laws" to "any *person* within [their] jurisdiction." *Id.* § 1, cl. 2 (emphasis added). The juxtaposition of

"citizen" in one clause and "person" in the next makes plain that the Equal Protection Clause protects "all persons within [a state's] territorial jurisdiction," and "is not confined to the protection of citizens." *Yick Wo*, 118 U.S. at 369.

The text of the Equal Protection Clause, protecting persons rather than citizens, is an unpromising premise for Appellants' argument that *Reynolds* interpreted the clause to protect only voters. But Section 2 of the Fourteenth Amendment dispels any doubt. Section 2 replaced Article I's reference to "the whole Number of free Persons" in the state with "the whole Number of Persons" in the state, and expressly gave *all* "persons" equal weight in the apportionment base.

Again, *amici* recognize that Section 2 applies to Congressional representation, and not directly to state and local districting. However, "[t]he [Fourteenth] Amendment is a single text," drafted, debated, and ratified "as a unit." *Reynolds*, 377 U.S. at 594 (Harlan, J., dissenting). It cannot be maintained that the same drafters who believed that equal representation in Congress required apportionment based on "persons," not voters, simultaneously believed that application of that same principle by states or localities would be an unconstitutional denial of "equal protection of the laws." "[T]hose who framed and adopted the Fourteenth Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly [permitted in] § 2 of the Amendment." *Richardson* v. *Ramirez*, 418 U.S. 24, 43 (1974).

Indeed, in framing the Fourteenth Amendment, Congress explicitly considered apportionment based on voters, but soundly rejected such a principle in favor of equal representation for all people. For example, Senator Jacob Howard of Michigan, who served on the committee that drafted the Fourteenth Amendment, explained that apportionment based on persons was necessary, in part, because the distribution of voters varied from state to state:

> Nor did the committee adopt the principle of making the ratio of representation depend upon the number of voters, for it so happens that there is an unequal distribution of voters in the several States, the old States having proportionally fewer than the new States.

Cong. Globe, 39th Cong., First Sess. 2767 (1866). In order to "avoid this inequality," the committee "adopted numbers as the most just and satisfactory basis" for congressional apportionment. Most famously, Senator Howard added, *"[n]umbers, not voters; . . . this is the theory of the Constitution. Id.* (emphasis added).

Similarly, Senator Johnson of Maryland explained that basic "republican theory" requires that nonvoters (including "aliens," "women," "minors," and "rebels") be included in the apportionment base and that "the basis of representation" should depend upon "the entire number of the people to be represented." *Id.* at 2767-68. Echoing the Founders' endorsement of virtual represen-tation, he explained that we may not "deny [someone] the right to be represented . . . simply because they are not permitted to exercise the

right of voting . . . ." *Id.* at 3027-29. The right to be represented was different from the right to vote:

> [R]epresentation and the franchise are [not] identical. They are as different as light from darkness. The Constitution says so; your own amendment proclaims it. [R]epresentation is to depend upon numbers. . . . *[A] right to be represented [is] not a right to vote.*"

Id. at 3029 (emphasis added).

These legislators who deemed "persons," not voters, to be the "most just and satisfactory basis" for apportionment of the U.S. Congress are the same individuals who, at same time, created the Equal Protection Clause guaranteeing all "persons" (not all voters or all citizens) equal protection of the laws. It is unthinkable that they would have deemed the Equal Protection Clause to render *unlawful* state and local redistricting plans that secure equal representation to all persons within the relevant jurisdiction.

C. Historical Developments Have Not Nullified the Constitution's Principle of Equal Representation.

Appellants cannot—and thus, do not—argue that text or original meaning support their view. Instead, they argue changed circumstances, insisting that the divergence in total population and eligible-voter population is a recent phenomenon that renders text and history irrelevant. *See* Brief of Appellants at 27-28 (arguing that, until recently, the "distribution of the voting population generally did not deviate from

the distribution of total population to the degree necessary to raise this issue").

This is simply wrong. The Framers of the Fourteenth Amendment were acutely aware that the concentration of eligible voters varied from place to place. During the ratification debates, Senator Blaine noted that "[t]he ratio of voters to population" varied "from a minimum of nineteen per cent to a maximum of fifty-eight per cent." Cong. Globe, 39th Cong., First Sess. 141 (1866). Senator Hendricks objected to voter-based apportionment on the ground "that the newly settled States contain a very much larger proportion of males than the older States, and therefore a much larger ratio of voters." *Id.* at 2962. Congressman Conkling observed that "many of the large States" had a greater concentration of nonvoting "aliens." *Id.* at 359; *see also id.* at 2767 (remarks of Sen. Howard) (noting "unequal distribution of voters in the several States, the old States having proportionally fewer than the new States").

Immigration patterns have changed since 1866, of course, and the specific regions of the country with elevated concentrations of nonvoters have changed. But this makes no difference. Appellants argue that the Fourteenth Amendment's Framers based apportionment on total population because they believed that this was a reliable proxy for voters. Exactly the opposite. They chose to apportion based on total population, not voters, because they knew that total population *was not* a proxy for voters.

Appellants' *amici* also point to the enormous expansion of the electorate since 1866 and argue that the Constitution's theory of "virtual representation"

is now outmoded. *See* Brief of *Amicus Curiae* Cato Institute at 27 (arguing that, with the enfranchisement of women, "the [virtual representation] concern that actually motivated the drafters of the Fourteenth Amendment no longer carries any weight").

This is also incorrect. *See* Ely, DEMOCRACY AND DISTRUST 82 (noting that "virtual representation" has "survived in American political theory"). The premise of virtual representation is that not all people vote, and that those who do vote do so on behalf of everyone. That has not changed. It is true today, as it has always been, that "the People" and "the Electors" are not coextensive. And it is true today, as it has always been, that while all persons are protected by the Equal Protection Clause, the Constitution gives each state the freedom to enfranchise any group of nonvoters as it sees fit. *See Pope* v. *Williams*, 193 U.S. 621, 632 (1904) ("The privilege to vote in any State is not given by the Federal Constitution or by any of its amendments . . . . [It] is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper . . . .").

There is, for example, a long history of states permitting non-citizen immigrants to vote.[11] Texas,

---

[11] Twenty-two states and territories chose to extend the franchise to non-citizen immigrants, peaking in about 1875. By the 1920s, however, they had all reversed course. *See generally* Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. Pa. L. Rev. 1391 (1993).

the state whose redistricting is challenged by Appellants, only eliminated its law permitting non-citizen immigrants to vote in 1921. Keyssar, *supra*, at Table A12. Even today, some localities permit non-citizen immigrants to vote in municipal elections. *See* Derek T. Muller, *Invisible Federalism and the Electoral College*, 44 Ariz. St. L.J. 1237, 1276 (2012). Meanwhile, there are spirited debates about lowering the voting age, and some jurisdictions already allow 16-year olds to vote.[12] Similarly, there is no uniformity in state rules disenfranchising the mentally incompetent and felons, and here too there are political efforts to liberalize voting rights.[13] Indeed, there are even some states that permit non-

---

[12] Vivian E. Hamilton, Democratic Inclusion, Cognitive Development, and the Age of Electoral Majority, 77 Brooklyn L. Rev. 1447, 1473-74 (2012); Lindsey A. Powers, Takoma Park Grants 16-Year-Olds Right to Vote, Wash. Post (May 14, 2013).

[13] American Civil Liberties Union, *Criminal Re-enfranchisement Laws*, https://www.aclu.org/map/state-criminal-re-enfranchisement-laws-map (felon voting laws vary by state, with some permanently disenfranchising felons, some allowing them to vote after parole, and some allowing everyone to vote, even incarcerated felons); Kimberly Leonard, *Keeping the Mentally Incompetent from Voting*, The Atlantic (Oct. 17, 2012) (noting that voting rights for mentally incompetent persons vary from state to state and describing efforts to enfranchise this group).

residents who own property to vote in local elections.[14]

It would be a peculiar reading of our federal Constitution if, for purposes of state and local redistricting, the only "persons" protected by the Equal Protection Clause are voters—as that group is determined from time to time by the several states, using standards that differ from state to state and locality to locality, and that may, or may not, include immigrants, young adults under 18, mentally incapacitated persons and felons.[15] Rather, the principle of virtual representation enshrined in the Constitution still lives: persons are persons, and voters (however that group is defined by state and federal law) vote on behalf of all persons, electing legislators who represent all persons.

Moreover, even among those who are permitted to vote, relatively few actually do: voter turnout in the United States is "among the lowest of any industrial democracy's." John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 Yale L.J. 163, 183 (1984). In the November 2014 general election, about 31% of registered voters in Los

---

[14] National Conference of State Legislatures, *Voting by Nonresidents and Noncitizens* (February 27, 2015).

[15] In August 2015, the California Secretary of State dropped an appeal of a court ruling that enfranchised felons on mandatory supervision and post-release community supervision. The result was to expand the voting population of California. Press Release, California Secretary of State Alex Padilla, *Secretary Padilla Ends Appeal of Scott v. Bowen Case* (Aug. 4, 2015).

Angeles County cast ballots. Patrick McGreevy, *L.A.'s Low Voter Numbers Push State Officials Toward Easing Process*, L.A. Times (March 14, 2015). That was a huge improvement from the June primary, when Los Angeles County's turnout was just 16.9% of registered voters. California Secretary of State, *Statement of Vote: June 3, 2014 Statewide Direct Primary Election* at 3, http://elections.cdn.sos.ca.gov/sov/2014-primary/pdf/2014-complete-sov.pdf. Meanwhile, in the City of Los Angeles, voter turnout for the 2014 mayoral election was just 18.5% of registered voters, and turnout at the city's municipal elections in March 2015 was an abysmal 9.5%. McGreevy, *supra*.

Thus, just as at the Founding, our elected representatives are chosen by a small fraction of their constituency. Our legitimacy as a representative democracy depends upon the concept of virtual representation enshrined in the Constitution. Persons who cannot or do not vote are still entitled to equal representation in our state and local legislatures and they are virtually represented in the polling booths by those who exercise the franchise. Nothing fundamental has changed to justify rejecting the theory of republican government embraced by the Framers of both the Constitution and the Fourteenth Amendment.

D. This Court's Reapportionment Cases Did Not Elevate Electoral Equality Over Representational Equality.

According to Appellants, the Fourteenth Amendment's Equal Protection Clause does not guarantee all persons equal representation; it merely

guarantees all *voters* an equally "weighted" *vote*. They base this assertion not on anything in the text of the Fourteenth Amendment, or on anything said by any of the amendment's Framers, but on certain passages in *Baker*, *Reynolds*, and their progeny that disapprove of the "debasement or dilution of the weight of a citizen's vote." *Reynolds*, 377 U.S. at 555.

There is indeed "a seeming looseness in the language" of these decisions, which refer to representational equality and electoral equality, sometimes in the same breath. *Calderon*, 481 P.2d at 490. But any nods toward electoral equality in those decisions do not come close to justifying wholesale abandonment of the Constitution's text and original meaning. Far from jettisoning representational equality, the decisions state that "our Constitution's plain objective was . . . *equal representation for equal numbers of people*." *Reynolds*, 377 U.S. at 559-60 (emphasis added); *see also id.* at 560-61 ("the fundamental principle of representative government in this country is one of equal representation for equal numbers of people").[16]

In fact, this Court has recognized that equality of representation is the real principle, not the elusive notion of the mathematical weight of a single vote. "The personal right to vote is a value in itself, and a citizen is, without more and *without mathematically*

---

[16] *Amici* agree that "special population problems" may justify, at least on an interim basis, limited deviations from the use of total population as the standard for redistricting. *Burns* v. *Richardson*, 384 US 73, 94 (1966). That issue, however, is not presented here.

calculating his power to determine the outcome of an election, shortchanged if he may vote for only one representative when citizens in a neighboring district, *of equal population*, vote for two." *Bd. of Estimate* v. *Morris*, 489 U.S. 688, 698 (1989) (emphasis added). So viewed, it is proper to say that a vote is diluted only when a voter is consigned to vote in a district that has significantly more people than a neighboring district. In that case, all of the "person[s] within [that] jurisdiction"—and not just the voters—are denied equal protection of the laws.

CONCLUSION

The District Court's judgment should be affirmed.

Respectfully submitted,

GREGORY L. DISKANT
Counsel of Record
JONAH M. KNOBLER
KATHRINA SZYMBORSKI
PATTERSON BELKNAP
WEBB & TYLER LLP
1133 Ave. of the Americas
New York, NY 10036
(212) 336-2000
gldiskant@pbwt.com

Counsel for Amici Curiae
(additional counsel listed on cover)

September 25, 2015

Supreme Court, U.S.
FILED
AUG - 7 2015
OFFICE OF THE CLERK

No. 14-940

In The
Supreme Court of the United States

SUE EVENWEL, ET AL.,
Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS
GOVERNOR OF TEXAS, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF OF DEMOGRAPHERS PETER A. MORRISON, THOMAS M. BRYAN, WILLIAM A. V. CLARK, JACOB S. SIEGEL, DAVID A. SWANSON, AND THE PACIFIC RESEARCH INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

C. DEAN MCGRATH, JR.
McGrath & Associates
1025 Thomas Jefferson St., NW
Ste. 110G
Washington, D.C. 20007
(202) 295-2304

BRADLEY A. BENBROOK
Counsel of Record
STEPHEN M. DUVERNAY
Benbrook Law Group, PC
400 Capitol Mall, Ste. 1610
Sacramento, CA 95814
(916) 447-4900
brad@benbrooklawgroup.com

Counsel for Amici Curiae

August 2015

QUESTION PRESENTED

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that the Equal Protection Clause of the Fourteenth Amendment includes a "one-person, one-vote" principle. This principle requires that, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970). In 2013, the Texas Legislature enacted a State Senate map creating districts that, while roughly equal in terms of total population, grossly malapportioned voters. Appellants, who live in Senate districts significantly overpopulated with voters, brought a one-person, one-vote challenge, which the three-judge district court below dismissed for failure to state a claim. The district court held that Appellants' constitutional challenge is a judicially unreviewable political question.

The question presented is whether the "one-person, one-vote" principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The Census Bureau Designed And Implemented The American Community Survey To Furnish Detailed Demographic Data On An Ongoing Basis For Places of All Sizes 5

A. The ACS Has Modernized The Census Bureau's Collection Of Demographic Data 5

B. The Federal Government Relies On ACS Data To Administer Federal Programs 10

II. The Bureau Calculates CVAP From ACS Data And Publishes Annual Updates In A Readily Accessible Format 12

III. CVAP Data Are Routinely Used To Prove And Remediate Inequalities In Voting 15

A. The Judiciary Has Determined That CVAP Data Are Necessary In Section 2 Claims, And State And Local Governments Rely On Them When Redistricting 15

B. CVAP Was A Key In Measuring Compliance With Section 5 Of The Voting Rights Act 20

C. Congress Relied On CVAP Data To Protect Minority Voting Rights In Section 203 Of The VRA 22

IV. Demographers Can Use Straightforward Techniques To Construct State And Local Voting Districts Of Substantially Equal CVAP 23

V. Redistricting Based On Survey Data Fits Comfortably Within The Court's Decisions Recognizing That Redistricting Is Not A Precise Mathematical Exercise 27

CONCLUSION 31

TABLE OF AUTHORITES

Cases Page

Barnett v. City of Chicago,
141 F.3d 699 (7th Cir. 1998) 18

Bartlett v. Strickland,
556 U.S. 1 (2009) 17

Brown v. Thompson,
462 U.S. 835 (1983) 30

Campos v. City of Houston,
113 F.3d 544 (5th Cir. 1997) 17, 18

Connor v. Finch,
431 U.S. 407 (1977) 29

Gaffney v. Cummings,
412 U.S. 735 (1973). 28, 29, 30

Georgia v. Ashcroft,
539 U.S. 461 (2003) 29

Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo., 397 U.S. 50 (1970). i

League of United Latin Am. Citizens v. Perry,
548 U.S. 399 (2006) 16, 29

Mahan v. Howell,
410 U.S. 315 (1973) 29

Negron v. City of Miami Beach,
113 F.3d 1563 (11th Cir. 1997) 17

Pender Cnty. v. Bartlett,
649 S.E.2d 364 (N.C. 2007) 17

Reynolds v. Sims,
377 U.S. 533 (1964) ..... passim

Romero v. City of Pomona,
883 F.2d 1418 (9th Cir. 1989) 17

Shelby County v. Holder,
570 U.S. ——, 133 S. Ct. 2612 (2013) 20

Swan v. Adams,
385 U.S. 440 (1967) 29

Texas v. United States,
133 S. Ct. 2885 (2013) 21

Texas v. United States,
887 F.Supp.2d 133 (D. D.C. 2012) 21

Thornburg v. Gingles,
478 U.S. 30 (1986) 15, 16, 17

Townsend v. Holman Consulting Corp.,
914 F.2d 1136 (9th Cir. 1990) 17

United States v. Sch. Bd. of Osceola Cnty.,
No. 6:08-cv-00582-GKS-DAB (M.D. Fla. Apr. 16, 2008) 19

United States v. Town of Lake Park, Fla.,
No. 09-cv-80507-KAM (S.D. Fla. Mar. 31, 2009)..19

United States v. Village of Port Chester,
No. 06-civ-15173 (S.D.N.Y. Dec. 15, 2006).....19

Voinovich v. Quilter,
507 U.S. 146 (1993) 30

Statutes

20 U.S.C. § 6821.....10

42 U.S.C. § 1395w-4(e)(1)(H)(v)(II) 10

52 U.S.C. § 10301(a) 15

52 U.S.C. § 10503.....22

Other Authorities

Arizona Independent Redistricting Commission,
United States Dep't of Justice Submission Under Section 5 of Voting Rights Act, State of Arizona Legislative Redistricting Plan (Feb. 28, 2012).....21

Br. for the United States as *Amicus Curiae* Supporting Appellees, *League of United Latin Am. Citizens v. Perry* (2006) (Nos. 05–204, 05–254, 05–276, 05–439). 16

Bruce E. Cain & Karin Mac Donald,
Voting Rights Act Enforcement: Navigating Between High and Low Expectations, in *The Future of the Voting Rights Act* (David L. Epstein et al., eds., 2006) 20

Congressional Research Service,
The 2010 Decennial Census: Background and Issues (Feb. 3, 2011) 5

Congressional Research Service,
The American Community Survey: Development, Implementation, and Issues for Congress (June 17, 2013) 6, 7, 10, 12

Mark Doms,
The American Community Survey: Best Quality Data with the Least Public Burden (June 30, 2014) 11

Lapkoff & Gobalet Demographic Research, Inc.,
Redistricting Report to the Board of Trustees Hartnell Community College District (Oct. 13, 2011) 18

Michael Li,
Updated demographic data for Texas legislative & congressional maps, Texas Redistricting & Election Law, http://txredistricting.org/post/78929777903/updated-demographic-data-for-texas-legislative (Mar. 8, 2014) 20

March 18, 2015 Memorandum of Peter A. Morrison to Waterbury, Connecticut, Board of Alderman regarding the City of Waterbury 2015 Aldermanic Districting Plan 18

Catherine McCully, *Designing P.L. 94-171 Redistricting Data for the Year 2020 Census* (U.S. Census Bureau Dec. 2014) 14

State Appellees' Br., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (Nos. 05–204, 05–254, 05–276, 05–439) 16

State of California Citizens Redistricting Commission, *Final Report On 2011 Redistricting* (Aug. 15, 2011).....19

Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering & the Efficiency Gap*, 82 U. Chi. L. Rev. 831 (2015).....30

Texas Legis. Council, *Estimating Citizenship Voting Age Population Data (CVAP), Addendum to Data for 2011 Redistricting in Texas* (March 2013) 20

U.S. Census Bureau, *A Compass for Understanding and Using American Community Service Data: What Congress Needs to Know* (2008).....9, 10, 11

U.S. Census Bureau,
A Compass for Understanding and Using American Community Service Data: What General Data Users Need to Know (2008) 14

U.S. Census Bureau,
American Community Survey Design and Methodology (Jan. 2014) 6

U.S. Census Bureau,
American Community Survey Information Guide (April 2013) 7, 8, 9, 10

U.S. Census Bureau,
American Community Survey, Questions on the Form and Why We Ask 11

U.S. Census Bureau,
Frequently Asked Questions, Can you tell me more about group quarters (GQ) or group housing facilities in the American Community Survey (ACS)? 7, 8

U.S. Census Bureau,
Methodology for the United States Population Estimates: Vintage 2014 (2014) 27

U.S. Census Bureau,
Subjects Planned for the 2010 Census and American Community Survey: Federal Legislative and Program Uses (2008) 11

U.S. Comm'n on Civil Rights,
Redistricting and the 2010 Census: Enforcing Section 5 of the Voting Rights Act (Sept. 2012) 20, 21

U.S. Dep't of Commerce Economics & Statistics Admin., *The Value of the American Community Survey: Smart Government, Competitive Businesses, and Informed Citizens* (April 2015) ..... passim

U.S. Dep't of Commerce, *The American Community Survey* (2015 Informational Copy) 12

INTEREST OF *AMICI CURIAE*[1]

Peter A. Morrison, Ph.D., is an applied demographer and the founding director of RAND Corporation's Population Research Center. Now retired from RAND, he consults as a demographer with expertise in measuring the racial, ethnic, and citizenship composition of local populations. He has decades of experience constructing and evaluating local districting plans that comply with Voting Rights Act requirements. He has been appointed to committees of the National Academy of Sciences, chaired the U.S. Census Bureau's Advisory Committee on Population Statistics, and served as an invited participant on the Bureau's Working Group on Race and Ethnicity, 2010 Decennial Census. He has been elected President of the Southern Demographic Association and as a Director of the Population Association of America. Dr. Morrison served as a paid consultant for Appellants in the underlying litigation.

Thomas M. Bryan, M.I.S, M.U.S., is Principal, Bryan GeoDemographics, and a specialist in geographic information systems ("GIS") and geospatial analysis. A former Census Bureau analyst, he has extensive technical experience accessing, evaluating, and applying American Community Survey data for local redistricting. He served as a

---

[1] All parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

paid consultant for Appellants in the underlying litigation.

William A. V. Clark, Ph.D., is Distinguished Professor Emeritus of Geography and Statistics at UCLA. Professor Clark has extensive experience evaluating redistricting plans using census data, is an elected Member of the National Academy of Sciences, and a Fellow of the American Academy of Arts and Sciences.

Jacob S, Siegel, M.A., is a private consultant at J. Stuart Siegel Demographic Services. Previously he was a Senior Demographic Statistician at the U.S. Census Bureau and a Professorial Lecturer in Demography at Georgetown University. He is the primary author of the *Methods and Materials of Demography*, which demographers regard as the authoritative source of technical demographic methods, and the author of *Applied Demography*. He is a former President of the Population Association of America.

David A. Swanson, Ph.D., is a Professor of Sociology at the University of California, Riverside. Professor Swanson has chaired the U.S. Census Bureau's Scientific Advisory Committee and the Population Association of America's Applied Demography Committee and served as editor of *Population Research and Policy Review*. With Mr. Siegel, he co-edited the second edition of *The Methods and Materials of Demography*.

The Pacific Research Institute ("PRI") is a non-profit non-partisan 501(c)(3) organization that champions freedom, opportunity, and personal responsibility by advancing free-market policy solutions to the issues that impact the daily lives of

Americans. Founded in 1979 and based in San Francisco, PRI is supported by private contributions. Its activities include compilation, assessment, evaluation and analysis of complex statistical data, and the publication of studies based on such data.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellants contend that it violates the one-person, one-vote principle when States, such as Texas, dilute the power of citizens' votes by as much as 50% compared to other voters in nearby districts. Here, Texas refused to reduce these imbalances despite having the data—citizen voting age population (CVAP) statistics compiled by the United States Census Bureau—and the means available to do so.

Amici demographers will demonstrate that States and political subdivisions can—and, in many cases, already do—take CVAP into account when developing redistricting plans. Using official Census Bureau data, professional demographers, such as *amici*, can readily establish district boundaries that divide citizen voting-age population on a "substantially equal" basis. *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964).

The foundation for this demographic work is the citizenship data collected through the Census Bureau's American Community Survey ("ACS"). The Bureau designed and implemented the ACS to collect detailed demographic information on an ongoing basis. The ACS, which replaced the "long form" questionnaire beginning with the 2010 Decennial Census, collects a broad range of demo-

graphic data covering citizenship and other economic, social, housing, and financial characteristics. The survey is administered on a rolling basis and reaches approximately 3.5 million households each year. The federal government relies on ACS data to, among other things, serve as the basis for distributing more than $450 billion in federal programs.

The Census Bureau compiles running 1-, 3-, and 5-year summaries of ACS data and publishes them on its website. The Bureau's data tables include CVAP at every level of geography for which ACS data are collected throughout the Nation. These tables, in turn, allow demographers, legislators, and the general public to calculate a jurisdiction's CVAP with relative ease.

The reliability of the Census Bureau's CVAP data is demonstrated by its widespread use and acceptance. The Justice Department, States and local governments use CVAP data to ensure compliance with the Voting Rights Act ("VRA"). This Court, U.S. Courts of Appeals, and district courts have also relied on CVAP data. For example, CVAP is a necessary consideration when evaluating minority voting-strength under Section 2 of the VRA. CVAP was likewise a key metric when assessing retrogression under Section 5 of the VRA. And CVAP data govern whether States and localities must provide non-English language ballot materials under Section 203 of the VRA.

In short, the Bureau's CVAP data is reliable enough to allow states, like Texas, to draw, analyze, and adjust voting district boundary lines of substantially equal numbers of eligible voters.

ARGUMENT

I. The Census Bureau Designed And Implemented The American Community Survey To Furnish Detailed Demographic Data On An Ongoing Basis For Places Of All Sizes.

The Census Bureau conducts a decennial enumeration of persons in the United States pursuant to Article 1, section 2 of the Constitution. The Bureau's mandate, however, is not limited to the enumeration. The Bureau collects detailed information from residents on an ongoing basis through the ACS.[2]

A. The ACS Has Modernized The Census Bureau's Collection Of Demographic Data.

For nearly 60 years, the Census Bureau supplemented its decennial census with a "long form" questionnaire that elicited detailed socioeconomic and housing information from a sample of the population. Congressional Research Service, *The 2010 Decennial Census: Background and Issues* 3 (Feb. 3, 2011).[3] Prompted by declining response rates, increasing costs, and expanding needs for

---

[2] This is one of numerous Bureau surveys that supplement the decennial census. 13 U.S.C. § 193. In addition to the ACS, among the most widely relied on national sample surveys are the Current Population Survey (CPS), http://www.census.gov/cps/, and the Survey of Income and Program Participation (SIPP), http://www.census.gov/sipp/.

[3] Online at https://www.census.gov/history/pdf/2010-background-crs.pdf (all internet materials as visited Aug. 4, 2015).

timely demographic data following the 1990 Census, the Census Bureau "began developing and testing a new means of data collection called a 'rolling sample' or 'continuous measurement' survey that became the American Community Survey." Congressional Research Service, *The American Community Survey: Development, Implementation, and Issues for Congress* 1 (June 17, 2013) (*ACS Development and Implementation*).[4]

After extensive testing and analysis, the Bureau implemented the ACS nationwide in 2005 and 2006, and it stopped using the "long form" with the 2010 Census. U.S. Census Bureau, *American Community Survey Design and Methodology* 5-9 (Jan. 2014) (*ACS Design and Methodology*).[5] The Bureau assigns thousands of field representatives across the Nation to administer the ACS. *Id.* at 2. They are supported by Bureau field partners in six regional offices, survey managers at a Bureau processing center in Indiana, and call centers in Arizona, Maryland, and Indiana. *Id.* Recipients of the survey must provide answers—participation is not voluntary—and many of these resources are used for following up with non-responders.[6]

---

[4] Online at https://www.fas.org/sgp/crs/misc/R41532.pdf.

[5] Online at http://www2.census.gov/programs-surveys/acs/methodology/design_and_methodology/acs_design_methodology_report_2014.pdf.

[6] *See* U.S. Dep't of Commerce Economics & Statistics Admin., *The Value of the American Community Survey: Smart Government, Competitive Businesses, and Informed Citizens* 9 (April 2015) (*Value of the ACS*), online at http://www.esa.gov/sites/default/files/the-value-of-the-

"Since its start," the Bureau notes, "the ACS has been providing a continuous stream of updated information for states and local areas, and will revolutionize the way we use statistics to understand our communities." U.S. Census Bureau, *American Community Survey Information Guide* 2 (April 2013) (*ACS Information Guide*).[7] The survey is currently sent to approximately 295,000 addresses each month—nearly 3.54 million addresses annually—in all 3,141 counties in the 50 states, the District of Columbia, and Puerto Rico. *ACS Development and Implementation* at 11; *ACS Design and Methodology* at 10. "The large sample size affords comprehensive coverage of the Nation and permits statistically reliable estimation for small and large geographic areas." *Value of the ACS, supra* note 6, at 5.

The Bureau obtains its survey address data from its Master Address File (MAF)—the Bureau's "official inventory of known housing units (HUs), group quarters (GQs),[8] and selected non-

---

acs.pdf ("The mandatory nature of the survey ensures that the sample sizes for all areas are sufficient for reliable statistics.").

[7] Online at http://www.census.gov/programs-surveys/acs/about/information-guide.html.

[8] "Group quarters include such places as college residence halls, residential treatment centers, skilled nursing facilities, group homes, military barracks, correctional facilities, and workers' dormitories. Group quarters are categorized into two groups, institutional and non-institutional, in the ACS estimates. Institutional group quarters: Includes facilities for people under formally authorized, supervised care or custody at the time of interview, such as correctional facilities, nursing facilities/skilled nursing facilities, in-patient hospice facilities, mental (psychiatric) hospitals, group

residential units (public, private, and commercial)." *ACS Design and Methodology* at 18. Since 2000, the Bureau has also developed and updated in the MAF an inventory of "special places (SPs)," which are "places such as prisons, hotels, migrant farm camps, and universities." *Id.* at 26.

The ACS collects data in five general categories:

1. Demographic characteristics—such as age, sex, Hispanic origin, race;
2. Economic characteristics—such as income, work status, occupation;
3. Social characteristics—such as citizenship, ancestry, place of birth, education, and disability;
4. Housing characteristics—such as age of structure and number of rooms; and
5. Financial characteristics—such as housing value and rent.

U.S. Census Bureau, *A Compass for Understanding and Using American Community Service Da-*

---

homes for juveniles, and residential treatment centers for juveniles. Non-institutional group quarters: Includes facilities that are not classified as institutional group quarters, such as college/university housing, group homes intended for adult, residential treatment facilities for adults, workers' group living quarters and Job Corps centers, and religious group quarters." Census Bureau, *Frequently Asked Questions, Can you tell me more about group quarters (GQ) or group housing facilities in the American Community Survey (ACS)?*, online at https://ask.census.gov/faq.php?id=5000&faqId=1681.

ta: What Congress Needs to Know 2 (2008) (*Bureau Compass for Congress*).[9]

The Bureau compiles running 1-, 3-, and 5-year summaries of data collected by the ACS and publishes them on its American FactFinder website.[10] *ACS Design and Methodology* at 182-97 (detailing preparation and dissemination of data). Its sampling methods capture representative and statistically valid data:

> The ACS is . . . representative geographically, providing statistically valid information for states, counties, and other large and small areas, such as cities, townships, and villages, congressional and state legislative districts, American Indian and Alaska Native areas and Hawaiian home lands, zip code tabulation areas, and school districts. The ACS is also representative of many small distinct populations, for example, reporting 2009–2013 estimates of per capita income by race and Hispanic origin for Crenshaw County, Alabama (2014 estimated population: 13,977).

Value of the ACS at 7 (emphasis omitted).

The Bureau refers to the ACS as a "revolution in data collection" that is now "the cornerstone of [its] effort to keep pace with the nation's ever-increasing demands for timely and relevant data

---

[9] Online at https://www.census.gov/content/dam/Census/library/publications/2008/acs/ACSCongressHandbook.pdf.

[10] The Census Bureau's American FactFinder is online, accessible at http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml.

about population and housing characteristics." *ACS Design and Methodology* at 1.

B. The Federal Government Relies On ACS Data To Administer Federal Programs.

Congress now allocates federal funding among beneficiaries in a wide variety of programs based on ACS data. The Congressional Research Service recently estimated that

> ACS data . . . are used to distribute more than $450 billion a year in funding. Thus, the timeliness and quality of ACS data are important for many reasons, but especially to promote the equitable allocation of scarce public resources.

ACS Development and Implementation at 1. *See, e.g.*, 42 U.S.C. § 1395w-4(e)(1)(H)(v)(II) (relying on ACS for rate-setting adjustments for physician reimbursement under Medicare); 20 U.S.C. § 6821 (funding allocation for education of immigrant children and children with limited English proficiency).

The federal government uses ACS data in the course of implementing multiple programs and policies:

> The questions on the ACS supply the raw data needed for a range of programs affecting education, veterans, employment, housing and community development, public health care, commuting, services for the elderly and disabled, and assistance programs for low-income families and children.

Census Bureau Compass for Congress at 4; *see also Value of the ACS* at 14-25 (elaborating on federal uses of ACS data).[11] The Commerce Department reports that 13 different cabinet-level agencies use ACS data, as do the Board of Governors of the Federal Reserve, the Social Security Administration, the Federal Communications Commission, and the National Science Foundation. *Value of the ACS* at 19.

Given these wide-ranging uses of ACS data, the Commerce Department's Under Secretary for Economic Affairs recently observed that "[t]he ACS is truly a unique, national treasure, producing a wealth of data on which our country relies to make important decisions." Mark Doms, *The American Community Survey: Best Quality Data with the Least Public Burden* (June 30, 2014) (noting also that the "value of ACS is immense" owing to the "fact that the ACS captures so much information so comprehensively").[12]

---

[11] The Bureau submitted a report to Congress before the 2010 Census detailing federal legislative and program use for each subject and question included in the census and ACS, and it maintains an online compilation detailing how the federal government uses the ACS data, sorted by each question from the survey. U.S. Census Bureau, *Subjects Planned for the 2010 Census and American Community Survey: Federal Legislative and Program Uses* (2008); U.S. Census Bureau, *American Community Survey, Questions on the Form and Why We Ask*, http://www.census.gov/acs/www/about/why-we-ask-each-question/.

[12] Online at http://www.commerce.gov/news/blog/2014/06/american-community-survey-best-quality-data-least-public-burden.

The conclusion that States and local governments can reliably use ACS data to distribute voting power equitably among their citizens is bolstered by the fact that the federal government *already* uses ACS data to distribute equitably a wide array of benefits and to manage federal programs.

II. The Bureau Calculates CVAP From ACS Data And Publishes Annual Updates In A Readily Accessible Format.

The ACS data most relevant to this case are the Bureau's published data tables that furnish compilations of citizen voting-age population (CVAP) data.[13] The Bureau publishes this data for all States, counties, cities and other Census "places," and, at the smallest level, Census block groups.[14] A block group is a cluster of census blocks that contains between 600 and 3,000 people. *Value of the ACS* at 25.[15]

---

[13] The citizenship data is specifically requested by the ACS, which asks: "Is this person a citizen of the United States?" U.S. Dep't of Commerce, *The American Community Survey* 8 (2015 Informational Copy), online at http://www2.census.gov/programs-surveys/acs/methodology/questionnaires/2015/quest15.pdf.

[14] Online at http://www.census.gov/programs-surveys/acs/geography-acs/concepts-definitions.html.

[15] A block "is the smallest geographic entity for which the Census Bureau tabulates decennial census data. Many blocks correspond to individual city blocks bounded by streets, but blocks— especially in rural areas—may include many square miles and may have some boundaries that are not streets." *ACS Development and Implementation* at 10 n.63.

The Bureau publishes this data online through its American FactFinder website. These data enable demographers, legislators, or any interested person to calculate a jurisdiction's CVAP with relative ease by selecting the relevant geography and data from Table B05003.[16]

Consider the following example for Denton County, Texas. The calculated CVAP for the county is 447,100, computed as follows from Table B05003:

1. Add the numbers for "Male: 18 years and over" and "Female: 18 years and over," to get the total voting-age population:

$$243{,}096 + 258{,}357 = 501{,}453$$

2. Subtract from the total voting-age population the numbers for non-citizens ("Male: 18 years and over: Not a U.S. citizen" and "Female: 18 years and over: Not a U.S. citizen"):

$$501{,}453 - 27{,}358 - 26{,}995 = 447{,}100$$

This calculation can be performed using Table B05003 for any particular state, county, city, census tract, census block group, or other ACS level of geography. Using the margin of error shown for each row of data, one can calculate the corre-

---

[16] Table B05003, from which the tables for all ACS geographies can be accessed, is online at http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_5YR_B05003&prodType=table ("Sex By Age By Nativity And Citizenship Status").

sponding margin of error for the calculated CVAP of 447,100.[17]

The Bureau also furnishes the "Citizen Voting Age Population (CVAP) Special Tabulation" of ACS data prepared for the U.S. Department of Justice for the purpose of redistricting. The Special Tabulation provides CVAP data from the ACS's 5-year estimates, updated annually (most recently for 2009-2013).[18] The Bureau explains: "States continue to use the ACS to analyze characteristics of the districts established in the redistricting process. The citizenship by voting age and race and ethnicity custom tabulation (CVAP) is now released on an annual basis every February per the request of several states and the Department of Justice." Catherine McCully, *Designing P.L. 94-171 Redistricting Data for the Year 2020 Census* 22 (U.S. Census Bureau Dec. 2014).[19]

In short, CVAP data are readily accessible to State and local governments, as well as their demographers and their citizens.

---

[17] The methodology for calculating the margin of error for an ACS estimate is explained in U.S. Census Bureau, *A Compass for Understanding and Using American Community Service Data: What General Data Users Need to Know* 10-11 & A-11-A-17 (2008).

[18] Published online at https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html.

[19] Online at http://www.census.gov/content/dam/Census/library/publications/2014/rdo/pl94-171.pdf.

III. CVAP Data Are Routinely Used To Prove And Remediate Inequalities In Voting.

Assertions that ACS CVAP data are not sufficiently reliable to use in connection with redistricting are without merit and contrary to decisions of this Court and the courts of appeal, as well as the practices of States, local jurisdictions, and the Justice Department.

A. The Judiciary Has Determined That CVAP Data Are Necessary In Section 2 Claims, And State And Local Governments Rely On Them When Redistricting.

Section 2 of the Voting Rights Act prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). The Court has established three "necessary preconditions" for an actionable vote-dilution claim under Section 2 of the Voting Rights Act: (1) a minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

This Court's recent Section 2 cases have accepted CVAP as the yardstick when assessing minority voting-strength. Most notably, CVAP was at the heart of a critical dispute over Texas's redistricting plans during the last apportionment

cycle. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 423-25, 427-29, 436-42 (2006) (opinion of Kennedy, J.) (*LULAC*);[20] *id.* at 493-94, 502-10 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part) (relying on CVAP as relevant statistic in compactness inquiry). The Court approved of the litigants' reliance on CVAP as a necessary consideration under *Gingles*: "Latinos, to be sure, are a bare majority of the voting-age population in new District 23, but only in a hollow sense, for the parties agree that the relevant numbers must include citizenship. This approach fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates." *LULAC*, 548 U.S. at 429 (opinion of Kennedy, J.).[21] The Court also used CVAP to determine proportionality when evaluating a minority group's opportunity to elect their candidate of choice. *Id.* at 436 ("We proceed now to the totality of the circumstances, and first to the proportionality inquiry, comparing the percentage of total districts that are Latino opportunity districts with the Latino share of the citizen voting-age population.").

---

[20] In fact, Justice Kennedy's opinion references the ACS when referring to Latino CVAP in Texas. *LULAC*, 548 U.S. at 438.

[21] When seeking affirmance, Texas and the United States (as *amici*) each relied on CVAP to argue that the challengers failed to meet their burden under Section 2. State Appellees' Br. at 93-95, *LULAC v. Perry*, 548 U.S. 399 (2006) (Nos. 05–204, 05–254, 05–276, 05–439) (discussing CVAP and Section 2 compliance); Br. for the United States as *Amicus Curiae* Supporting Appellees at 24-30, *LULAC v. Perry*.

Likewise, in *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Court and litigants relied on CVAP to evaluate the first *Gingles* requirement.[22]

Every Circuit Court to consider the issue has concluded that CVAP is a necessary consideration when evaluating the first *Gingles* requirement. *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1989) ("[E]ligible minority voter population, rather than total minority population, is the appropriate measure of geographical compactness."), *overruled in part on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir. 1990); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997) ("[T]he proper statistic for deciding whether a minority group is sufficiently large and geographically compact is voting age population as refined by citizenship."); *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997) ("[C]ourts evaluat-

---

[22] 556 U.S. at 12-15 (opinion of Kennedy, J.); *see also id.* at 26-28, 36-40 (Souter, J., dissenting). Although Justice Kennedy's opinion refers simply to "African-American voting-age population," rather than citizen voting-age population, the lower court's decision and Justice Souter's dissent make clear that the relevant metric in the case was CVAP. *Pender Cnty. v. Bartlett*, 649 S.E.2d 364, 371-76 (N.C. 2007) (describing "the critical question on appeal" as "whether the 'sufficiently large and geographically compact' minority population must constitute a numerical majority of citizens of voting age in order to satisfy the first *Gingles* precondition."); *Bartlett*, 556 U.S. at 27 (Souter, J., dissenting) ("In the plurality's view, only a district with a minority population making up 50% or more of the citizen voting age population (CVAP) can provide a remedy to minority voters lacking an opportunity 'to elect representatives of their choice.'").

ing vote dilution claims under section 2 of the Voting Rights Act must consider the citizen voting-age population of the group challenging the electoral practice when determining whether the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district."); *accord Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998) ("We think that citizen voting-age population is the basis for determining equality of voting power that best comports with the policy of the statute.").

In order to meet these Section 2 requirements, States and local jurisdictions throughout the Nation retain professionals like *amici* demographers to draw, analyze, and adjust voting district boundary lines to comply with Section 2—and they universally rely on CVAP data to accomplish this.[23] After *Bartlett*, moreover, demographers use CVAP to adjust boundary lines to ensure that districts retain majority-minority status. Every fraction of a percentage point is of intense interest to the political players in this process; they trust

---

[23] *Amicus* Dr. Morrison routinely relies upon CVAP to assess Section 2 compliance when consulting for several jurisdictions. For an example of a city that established new voting district boundary lines to comply with Section 2, see https://www.scribd.com/doc/273405839/Morrison-Memo-Waterbury-Aldermanic-2015-03-18 (March 18, 2015 Memorandum of Peter A. Morrison to Waterbury, Connecticut, Board of Alderman regarding the City of Waterbury 2015 Aldermanic Districting Plan). For an example of demographers using CVAP to analyze and adjust small-jurisdiction district lines in an effort to comply with Section 2, see Lapkoff & Gobalet Demographic Research, Inc., *Redistricting Report to the Board of Trustees Hartnell Community College District* (Oct. 13, 2011), online at http://bit.ly/1IluwrD.

that CVAP is a reliable data source for this sensitive work.

The Department of Justice likewise has relied on CVAP when bringing Section 2 enforcement actions. *E.g.*, Complaint ¶ 12, *United States v. Sch. Bd. of Osceola Cnty.*, No. 6:08-cv-00582-GKS-DAB (M.D. Fla. Apr. 16, 2008) ("The Hispanic population of the county is sufficiently numerous and geographically compact that a properly apportioned single-member district plan for electing the School Board can be drawn in which Hispanic persons would constitute a majority of the citizen voting-age population in one out of five districts."); Complaint ¶ 8, *United States v. Town of Lake Park, Fla.*, No. 09-cv-80507-KAM (S.D. Fla. Mar. 31, 2009); Complaint ¶ 8, *United States v. Village of Port Chester*, No. 06-civ-15173 (S.D.N.Y. Dec. 15, 2006).

Further examples abound. California's independent redistricting commission relied on ACS's CVAP data to assure that its final maps met the requirements of Section 2 of the Voting Rights Act. State of California Citizens Redistricting Commission, *Final Report On 2011 Redistricting* 15 & n.3 (Aug. 15, 2011) (explaining reliance on ACS and CVAP data); *see also id.* at 17-19 (discussing Section 2 compliance). Texas did so in constructing and defending its state legislative boundaries during this redistricting cycle.[24]

---

[24] The Texas Legislative Council published a research guide for using CVAP in connection with redistricting, along with CVAP data for each district in each set of maps. Texas Legis. Council, *Estimating Citizenship Voting Age Population Data (CVAP), Addendum to Data for 2011 Redistricting*

In short, CVAP is now an indispensable feature in voting rights litigation under Section 2.

B. CVAP Was A Key In Measuring Compliance With Section 5 Of The Voting Rights Act.

Until this Court struck down Section 4(b) of the Voting Rights Act in *Shelby County v. Holder*, 570 U.S. ——, 133 S. Ct. 2612 (2013), a staple of Section 5 preclearance work involved analyzing retrogression by referencing CVAP data. Indeed, the Justice Department itself routinely consulted CVAP data in conducting preclearance reviews and in pursuing Section 5 enforcement.[25] *See* U.S. Comm'n on Civil Rights, *Redistricting and the 2010 Census: Enforcing Section 5 of the Voting Rights Act* 54-55 (Sept. 2012) (describing the DOJ's "proportional retrogression" enforcement standard, which "assess[es] the gap between the actual number of minority ability districts and

---

in Texas (March 2013); Michael Li, *Updated demographic data for Texas legislative & congressional maps*, Texas Redistricting & Election Law, http://txredistricting.org/post/78929777903/updated-demographic-data-for-texas-legislative (Mar. 8, 2014).

[25] Consideration of CVAP is necessary to gauge the true effect of a proposed redistricting plan. "[T]o measure the 'real' electoral prospects of affected minority groups [in Section 5 retrogression analysis], as opposed to apparent ones, the Justice Department, and the jurisdictions themselves, often needed to look at Citizen Voting Age Population (CVAP), voter registration or Statement of Vote data." Bruce E. Cain & Karin Mac Donald, *Voting Rights Act Enforcement: Navigating Between High and Low Expectations*, in *The Future of the Voting Rights Act* 133 (David L. Epstein et al., eds., 2006).

the number of districts that would be roughly proportional to the minority share of the citizen voting age population").

For example, the Arizona Independent Redistricting Commission relied on CVAP to assess Hispanic voting strength when seeking Section 5 preclearance from the Department of Justice for its proposed legislative redistricting plan. Arizona Independent Redistricting Commission, *United States Dep't of Justice Submission Under Section 5 of Voting Rights Act, State of Arizona Legislative Redistricting Plan* 37 & n.3 (Feb. 28, 2012) (detailing commission's reliance on ACS's CVAP data to draw proposed districts); *see generally id.* at 84-133 (relying on CVAP when evaluating the proposed plan's effect on minority voters' ability to elect candidates of their choice).

In a similar vein, CVAP was widely used in earlier voting-rights litigation related to the same plans that are at issue in this case. *See Texas v. United States*, 887 F.Supp.2d 133 (D. D.C. 2012), vacated and remanded, *Texas v. United States*, 133 S. Ct. 2885 (2013). The District Court analyzed each challenged district by comparing Hispanic CVAP in the existing (or "benchmark") plan against Texas's proposed plan to determine whether the new plan ran afoul of Section 5's prohibition on retrogression. 887 F.Supp.2d at 153-56 (Congressional plan); 162-63 (State Senate plan); 167-177 (State House plan).

C. Congress Relied On CVAP Data To Protect Minority Voting Rights In Section 203 Of The VRA.

Demographers, the courts, State and local governments, and the Justice Department are not alone in their reliance on CVAP. Congress explicitly relied on CVAP data to protect minority voting rights. Section 203 of the Voting Rights Act, 52 U.S.C. § 10503, prohibits states and political subdivisions from providing English-only voting materials if a threshold percentage of citizens have limited proficiency in English. To determine whether a State or political subdivision is subject to Section 203's requirements, the statute defines a "covered State or political subdivision" "based on the 2010 American Community Survey census data and subsequent American Community Survey data in 5-year increments, or comparable census data." *Id.*, subd. (b)(2)(A). Two of these calculations must expressly consider "the citizens of voting age" as calculated by the ACS. *Id.*, subds. (b)(2)(A)(i)(I) and (II).

This mandate, Congress declared, is an issue of constitutional magnitude:

> The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices [that exclude citizens of language minorities from participation in the electoral process], and by prescribing other remedial devices.

Id., subd. (a).

All of this begs the question: If everyone agrees that CVAP is valid and sufficiently reliable for the various purposes outlined above, how could it be insufficiently valid and reliable for one-person, one-vote claims, especially since the Court has already instructed that exact precision is not required to satisfy the Fourteenth Amendment? *See Reynolds*, 377 U.S. at 578-79; *see also* Section V, *infra*. The answer: CVAP data are valid and reliable. Where necessary, they can be used to subdivide, with a known degree of reliability, almost any populated territory into districts populated by substantially equal numbers of voting-age citizens.

IV. Demographers Can Use Straightforward Techniques To Construct State And Local Voting Districts Of Substantially Equal CVAP.

The Bureau's five-year CVAP data may be—and have been—used to form voting districts populated by approximately equal numbers of voting-age citizens. While absolute precision is not and has never been the standard for state and local redistricting and is unattainable under any system in any event, *see Reynolds*, 377 U.S. at 577-79, ACS data more than suffices as the raw material for building districts of "substantially equal" numbers of eligible voters.

When it comes to forming state legislative districts, as in this case, the exercise is particularly straightforward. One such approach would entail these steps:

Step 1: Obtain five-year ACS CVAP data for the jurisdiction and divide the figure by the num-

ber of districts to obtain the "ideal" CVAP for each district.[26] *See* Section II *supra* (explaining CVAP computation).

Step 2: Obtain five-year ACS CVAP data at the census block group level using ACS Table B05003.

Step 3: Aggregate contiguous block groups to form the desired number of voting districts populated by approximately equal numbers of voting-age citizens. (A CVAP calculation for a particular district is referred to as a "period estimate.").

The process of building districts with CVAP data is precisely the same as building districts based on raw population data—the only difference is the data input. And, as with redistricting based on total population, the ease of equalizing period estimates among districts depends mainly on the number of additional factors to be considered (such as total population, compactness, and respect for existing administrative geography).

Accordingly, demographers can build districts based on CVAP with standard geographic information system (GIS) software. The software allows a user to combine contiguous units of census geography (*e.g.*, block groups, census tracts, cities) into a successively more populous area. As additional units are added or removed, the CVAP estimate for the newly defined aggregate automatically is revised up or down with the click of a button, and thereby accounted for exactly. By rearranging units of geography among adjacent ag-

---

[26] This calculation can also be made from the aggregation of CVAP in the block groups within the jurisdiction (Step 2).

gregates of territory, a demographer can gradually devise a set of voting districts populated by approximately equal numbers of voting-age citizens.

Step 4: Calculate the margin of error for each voting district. This calculation can be performed using the Table B05003 data published for each specific piece of geography that comprises the district: each block group, census tract, city, and county. The margin of error shown for each row furnishes the necessary basis for further calculations to derive the margin of error for each aggregate CVAP population that comprises each district.

Following these steps, a demographer can construct a 31-district Texas State Senate election plan in which the deviation from the equal-CVAP ideal (DI) is sufficiently small that, when combined with the margin of error, the plan's actual DI is certainly well below 10%.[27] Were such a plan built with the sole aim of minimizing the plan's overall CVAP deviation from ideal, that DI could be reduced to essentially zero. By contrast, the CVAP deviations from ideal in the Texas Plan

---

[27] The Court has recognized that redistricting based on the Census enumeration data involves inherent uncertainty as well. *See infra*, Section V. When considering CVAP-based districts, the statistical reality of a margin of error could (but need not) factor into the overall variation from ideal CVAP. That is, one could regard a CVAP "period estimate" as the relevant metric, disregarding its margin of error, or the margin of error could be added to the period estimates' DI to obtain the maximum possible DI.

S172 exceeded 45%. Appellants' Brief 9 (Table 1).[28]

The four-step process described above assumes that districts have been assembled without splitting block groups. And, for purposes of forming state legislative districts, such splitting will rarely be necessary.

In other situations, particularly when forming election districts at small geographic scales, it may be preferable or necessary to include some portions of certain census block groups. Examples where such splitting may be needed include division of small cities into districts where the administrative geography of a city does not conform to the Census statistical geography that contains it.

Demographers can use commonly accepted practices in such cases to subdivide ACS data into the smallest unit of Census statistical geography (the census block), then re-aggregate those relatively few blocks into the large districts comprising a redistricting plan for virtually any form of

---

[28] It should also be noted that, in the Section 2 decisions described above involving CVAP-based calculations of minority voter strength, the courts' acceptance of CVAP did not turn on a particular margin of error. Indeed, expert calculations of minority CVAP concentrations are often accepted by courts based on a determination that the finding is more likely than not, rather than a 90% or 95% level of confidence. Nevertheless, *amici* acknowledge the reality that, because the ACS is survey-based, assembling districts based on CVAP involves a margin of error.

administrative geography.[29] At that point, the demographer would pick up at step 3 above.

In sum, demographers can use CVAP data and commonly accepted techniques to draw election districts of substantially equal numbers of eligible voters at nearly any geographic scale.

V. Redistricting Based On Survey Data Fits Comfortably Within The Court's Decisions Recognizing That Redistricting Is Not A Precise Mathematical Exercise.

The Court has stressed that "substantial equality" is the rule when establishing state and local districts "so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds*, 377 U.S. at 579. As *Reynolds* stressed, "it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement." 377 U.S. at 577.

---

[29] One such common technique involves "raking" the data. Raking is the proportional redistribution of a set of numbers to a different total. This is an accepted demographic "best practice" the Census Bureau uses throughout its population estimates program. U.S. Census Bureau, *Methodology for the United States Population Estimates: Vintage 2014* 15 (2014), online at http://www.census.gov/popest/methodology/2014-natstcopr-meth.pdf ("The method involves iteratively controlling estimated values to the larger geography's characteristics and the smaller geography's total estimates.").

Moreover, this Court has long recognized that the Census itself is inherently imprecise:

> [Census] figures may be as accurate as such immense undertakings can be, but they are inherently less than absolutely accurate. Those who know about such things recognize this fact, and, unless they are to be wholly ignored, it makes little sense to conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted. The 'population' of a legislative district is just not that knowable for such refined judgments.

Gaffney v. Cummings, 412 U.S. 735, 745-46 (1973).

Gaffney explained that "[a] census by its nature can never be an exact count of a nation. This is especially true of the United States . . . . Thus an error of 1 or 2 percent in the count of the total population is to be expected; professionally, it is regarded as an 'acceptable' error." 412 U.S. at 745 n.10 (quoting H. Alterman, *Counting People: The Census in History* 262 (1969) (further noting that the Bureau "estimate[d] that the 1970 census had an under-coverage rate of 2.5%, or about 5,300,000 people")).[30] Rejecting a claim that max-

---

[30] Likewise, the Court has recognized the error inherent in relying on decennial figures to apportion for the following ten-year period. "States operate under the legal fiction that their plans are constitutionally apportioned throughout the decade, a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability."

imum deviations of 7.83% and 1.81% in Connecticut's legislative districts violated *Reynolds*' one-person, one-vote guarantee, the Court concluded that such "minor deviations" do not even require justification. *Id.* at 745; *see also Swann v. Adams*, 385 U.S. 440, 444 (1967) ("De minimis deviations are unavoidable").

Since *Reynolds*, this Court has recognized that more significant deviations from population equality are appropriate if they are "based on legitimate considerations incident to the effectuation of a rational state policy." 377 U.S. at 579. *See, e.g.*, *Mahan v. Howell*, 410 U.S. 315, 324-35 (1973) (accepting 16% deviation from population equality for districts drawn to keep intact existing political boundaries, and reaffirming *Reynolds*' holding that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable."); *Connor v. Finch*, 431 U.S. 407, 418-19 (1977) (rejecting 16.5% and 19.3% deviations because the state failed to provide a sufficient justification for the population disparity).

LULAC, 548 U.S. at 421 (opinion of Kennedy, J.) (citing *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003) ("[B]efore the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned."), and *Reynolds*, 377 U.S. at 583 ("[U]ndoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators.")).

Given the impossibility of a perfect count and States' ability to consider factors other than just population in non-congressional redistricting, the Court has adopted a constitutional "safe harbor" within which state and local governments need not justify district-to-district population disparities of less than 10%. *Brown v. Thompson*, 462 U.S. 835, 842 (1983) (relying on *Gaffney*, 412 U.S. at 745); *see also Voinovich v. Quilter*, 507 U.S. 146, 160-62 (1993); Nicholas Stephanopoulos & Eric McGhee, *Partisan Gerrymandering & the Efficiency Gap*, 82 U. Chi. L. Rev. 831, 886 (2015) ("The Court [has] concluded that population deviations above ten percent in state plans must be justified [by legitimate policies that necessitate the inequality]. But deviations *below* ten percent in state plans are presumptively valid unless they result from efforts to disadvantage a political or racial group.") (emphasis in original).

As demonstrated above, readily available CVAP data enable demographers to construct election districts and calculate deviations from ideal. These calculations involve known margins of error that establish the maximum possible deviations from ideal. In short, CVAP data are sufficiently valid and reliable to create districts that satisfy the rule of "substantial equality" under *Reynolds*.

CONCLUSION

Amici support appellants and agree it is unjust for state and local governments to construct districts of grossly disproportionate voting strength, particularly when they have reliable data at their fingertips to reduce those imbalances. State and local jurisdictions throughout the Nation already hire demographers to analyze their districts' compliance with the Voting Rights Act based on CVAP data. These jurisdictions can use that same data to comply with the one-person, one-vote principle.

Respectfully submitted,

C. DEAN MCGRATH, JR.
McGrath & Associates
1025 Thomas Jefferson St., NW
Ste. 110G
Washington, D.C. 20007
(202) 295-2304

BRADLEY A. BENBROOK
Counsel of Record
STEPHEN M. DUVERNAY
Benbrook Law Group, PC
400 Capitol Mall, Ste. 1610
Sacramento, CA 95814
(916) 447-4900
brad@benbrooklawgroup.com

August 2015

Counsel for Amici Curiae

Supreme Court, U.S.
FILED
AUG - 7 2015
OFFICE OF THE CLERK

No. 14-940

In The

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

STEVEN J. LECHNER
Counsel of Record
JEFFREY W. MCCOY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
jmccoy@mountainstateslegal.com

Attorneys for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *Reynolds v. Sims*, 377 U.S. 533 (1964), this Court held that the Equal Protection Clause of the Fourteenth Amendment includes a "one person, one vote" principle. This principle requires that, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970). In 2013, the Texas Legislature enacted a State Senate map ("Plan S172") creating districts that, while roughly equal in terms of total population, grossly malapportioned voters. Appellants, who live in Senate districts significantly overpopulated with voters, brought a "one person, one vote" challenge, which the three-judge district court below dismissed for failure to state a claim. The district court held that Appellants' constitutional challenge is a judicially unreviewable political question.

The question presented is whether the "one person, one vote" principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS	1
IDENTITY AND INTEREST OF AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. THE RIGHT TO VOTE IS ONE OF THE MOST FUNDAMENTAL RIGHTS AND A COURT MUST STRICTLY SCRUTINIZE A DISTRICTING SCHEME THAT DIMINISHES THAT RIGHT	4
II. A DISTRICTING SCHEME THAT DILUTES A CITIZEN'S VOTE BASED SOLELY ON WHERE HE OR SHE LIVES DIMINISHES THAT CITIZEN'S RIGHT TO VOTE	7
III. NO OTHER LEGISLATIVE CONSIDERATIONS CAN JUSTIFY A DIMINISHMENT OF A CITIZEN'S FUNDAMENTAL RIGHT TO VOTE	11
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors v. Peña, 515 U.S. 200 (1995) 1

Avery v. Midland Cnty., Tex., 390 U.S. 474 (1968) 10

Barnett v. City of Chicago, 141 F.3d 699 (7th Cir. 1998) 16, 17

Bartlett v. Strickland, 556 U.S. 1 (2009) 17, 18

Bd. of Estimate of City of New York v. Morris, 489 U.S. 688 (1989) 6, 13

Brown v. Thomson, 462 U.S. 835 (1983) 10

Burns v. Richardson, 384 U.S. 73 (1966) 12, 14, 15

Campos v. City of Houston, 113 F.3d 544 (5th Cir. 1997) 16, 20

Chapman v. Meier, 420 U.S. 1 (1975) 5, 14

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000) 19

Concrete Works of Colorado, Inc. v. City & County of Denver, 321 F.3d 950 (10th Cir. 2003) 1

Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996) 20

Davis v. Bandemer, 478 U.S. 109 (1986) 4

Dunn v. Blumstein, 405 U.S. 330 (1972) 4

Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 6

TABLE OF AUTHORITIES – Continued

Page

Gaffney v. Cummings, 412 U.S. 735 (1973) 14

Garza v. Cnty. of Los Angeles, 918 F.2d 763 (9th Cir. 1990) ..... *passim*

Ga. State Conference of NAACP v. Fayette Cnty. Bd. of Comm'rs, 775 F.3d 1336 (11th Cir. 2015) 18

Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984) 20

Gray v. Sanders, 372 U.S. 368 (1963) ..... *passim*

Hadley v. Junior Coll. Dist. of Metro. Kansas City, 397 U.S. 50 (1970) 5, 12, 14

Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) 4, 6, 7, 13

Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) 6

Kirkpatrick v. Preisler, 394 U.S. 526 (1969) 22

Lockport v. Citizens for Community Action, 430 U.S. 259 (1977) 5, 14

Mahan v. Howell, 410 U.S. 315 (1973) 7

Negron v. City of Miami Beach, 113 F.3d 1563 (11th Cir. 1997) 16, 17

Pope v. County of Albany, 687 F.3d 565 (2d Cir. 2012) 18, 19

Reyes v. City of Farmers Branch, 586 F.3d 1019 (5th Cir. 2009) 18, 19

Reynolds v. Sims, 377 U.S. 533 (1964) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989) 16, 20

Roxbury Taxpayers Alliance v. Delaware Cnty. Bd. of Sup'rs, 80 F.3d 42 (2d Cir. 1996) 20

Thornburg v. Gingles, 478 U.S. 30 (1986) 15, 16

Townsend v. Holman Consulting Corp., 929 F.2d 1358 (9th Cir. 1990) 16

Wesberry v. Sanders, 376 U.S. 1 (1964) 4, 10

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 1

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 4

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV ..... *passim*

U.S. Const. amend. XV, § 1 15

STATUTES

Voting Rights Act, Section 2, 42 U.S.C. § 1973 15

RULES

Supreme Court Rule 37.3 1

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Ron Lieber, *When to Call Your Elected Representatives for Help*, N.Y. Times, October 20, 2012, at B1, *available at* http://www.nytimes.com/2012/10/20/your-money/how-senators-and-representatives-can-help-constituents.html?module=ArrowsNav&contentCollection=Your%20Money&action=keypress&region=FixedLeft&pgtype=article 21

Scot A. Reader, *One Person, One Vote Revisited: Choosing A Population Basis to Form Political Districts*, 17 Harv. J.L. & Pub. Pol'y 521 (1994) 22

Timothy Mark Mitrovich, Comment, *Political Apportioning is not a Zero-Sum Game: The Constitutional Necessity of Apportioning Districts to be Equal in Terms of Both Total Population and Citizen Voter-Age Population*, 77 Wash. L. Rev. 1261 (2002) 22

U.S. Census Bureau, *American Community Survey*, *available at* http://www.census.gov/acs/www/about_the_survey/american_community_survey/ (last visited August 6, 2015) 12

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

Pursuant to Supreme Court Rule 37.3, Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Appellants.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF has members who reside and work in every state. Since its creation in 1977, MSLF attorneys have defended individual liberties and sought to ensure "equal protection of the laws." *E.g.*, *Adarand Constructors v. Peña*, 515 U.S. 200 (1995); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986); *Concrete Works of Colorado, Inc. v. City &*

[1] Pursuant to Supreme Court Rule 37.3, the undersigned certifies that all parties consent to the filing of this brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

County of Denver, 321 F.3d 950 (10th Cir. 2003). Accordingly, MSLF brings a unique perspective to this case and believes that its amicus curiae brief will assist this Court in deciding this case.

SUMMARY OF THE ARGUMENT

This Court should reverse the judgment of the district court because the right to vote is a fundamental right and this Court has repeatedly held that diluting a citizen's vote based on where he or she lives diminishes that right. It is a court's responsibility to protect the right to vote by scrutinizing any districting scheme that may diminish the voting power of a citizen. The three-judge panel of the district court, however, failed to conduct any review of either Plan S172 or the redistricting scheme at issue, and instead simply deferred to the State's judgment on the issue.

Although Plan S172 proportions Texas State Senate districts relatively equally by total population, the number of citizens of voting age in each district is extremely disproportionate. For example, Senate District 1, where Appellant Sue Evenwel lives, has 573,895 citizens of voting age, which is over 200,000 more than the senate district with the fewest number of citizens of voting age. Senate District 4, where Appellant Edward Pfenninger lives, has 533,010 citizens of voting age, over 160,000 more than the senate district with the fewest number of adult citizens. Therefore, voters in Senate Districts 1 and 4 need significantly more votes to guarantee that the

candidate of their choice is elected than voters from the district with the fewest number of citizens. This results in the citizens of Appellants' districts having less electoral power than citizens in districts where fewer votes are required to elect a senator. This Court, however, has repeatedly stated that a citizen's voting power cannot be determined solely based on where an individual lives. Accordingly, this Court should reverse the judgment of the district court which upheld Plan S172.

Although this Court has never expressly stated that the Fourteenth Amendment requires governments to apportion districts based on the number of citizens of voting age in each district, the principle of electoral equality of citizens is at the core of nearly all of this Court's "one person, one vote" cases. The principle of electoral equality recognizes that persons eligible to vote hold the ultimate political power in our democracy, and is served by apportionment by proportion of citizens of voting age, not total population. Therefore, a diminishment of electoral equality cannot be justified by other purported legislative principles, such as a desire for equal access to representatives. Furthermore, these other principles are not significantly affected when a state apportions districts to achieve electoral equality. Accordingly, this Court should reverse the judgment of the district court and expressly hold that the Fourteenth Amendment requires states to apportion districts to achieve a relatively equal number of citizens of voting age.

ARGUMENT

I. THE RIGHT TO VOTE IS ONE OF THE MOST FUNDAMENTAL RIGHTS AND A COURT MUST STRICTLY SCRUTINIZE A DISTRICTING SCHEME THAT DIMINISHES THAT RIGHT.

The right to vote is a fundamental right that this Court has an obligation to protect. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). "The Equal Protection Clause guarantees citizens that their State will govern them impartially. In the context of redistricting, that guarantee is of critical importance because the franchise provides most citizens their only voice in the legislative process." *Davis v. Bandemer*, 478 U.S. 109, 166 (1986) (Powell, J., concurring in part and dissenting in part) (internal citations omitted). A citizen thus "has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.").

This Court has made clear that "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Harper v.*

Virginia Bd. of Elections, 383 U.S. 663, 665 (1966). In order to be consistent with the Equal Protection Clause, "when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials." *Hadley v. Junior Coll. Dist. of Metro. Kansas City*, 397 U.S. 50, 56 (1970). Specifically, states must apportion districts in a manner that provides proportionate voting strength for the electors in each district. *Chapman v. Meier*, 420 U.S. 1, 24 (1975) ("All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group."); *Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 (1977) ("[I]n voting for their legislators, all citizens have an equal interest in representative democracy, and . . . the concept of equal protection therefore requires that their votes be given equal weight.").

This Court has made clear that:

> The personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating his power to determine the outcome of an election, shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or to put it another way, if he may vote for one representative and the voters in another

> district half the size also elect one representative.

Bd. of Estimate of City of New York v. Morris, 489 U.S. 688, 698 (1989). Therefore, a redistricting scheme that dilutes the voting power of citizens in certain districts violates an individual's fundamental right to vote and is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

Furthermore, because the right to vote is a fundamental right, government action that diminishes the right to vote must be strictly scrutinized. *Harper*, 383 U.S. at 670 ("We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) ("[S]tate apportionment statutes, which may dilute the effectiveness of some citizens' votes, receive close scrutiny from this Court.") (citation omitted)). "Strict scrutiny is a searching examination, and it is the government that bears the burden to prove" that any infringement on a fundamental right is justified. *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013). Importantly, a court cannot simply defer to the government and presume it "had acted in good faith. . . ." *See id.* at 2414.

The district court, however, failed to strictly scrutinize Plan S172. *See* Jurisdictional Statement App. at 13a-14a. Instead, the district court dismissed

Appellants' complaint without examining the effects of Plan S172 on individual voters' voting strength. *Id.* The district court's approach is inconsistent with this Court's precedent and the requirements of the Fourteenth Amendment. *Harper*, 383 U.S. at 670. Accordingly, this Court should reverse the judgment of the district court and hold that an infringement on the right to vote is subject to strict scrutiny.[2]

II. A DISTRICTING SCHEME THAT DILUTES A CITIZEN'S VOTE BASED SOLELY ON WHERE HE OR SHE LIVES DIMINISHES THAT CITIZEN'S RIGHT TO VOTE.

This Court should also reverse the judgment of the district court because it failed to apply the cardinal principle that one's voting power cannot be diminished solely because of where he or she lives. In *Gray*, this Court held that "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote." 372 U.S. at 381. This Court reasoned that "[h]ow then can one person be given twice or 10 times the voting power of

---

[2] Plan S172 creates a large enough deviation in number of citizens of voting age across districts that it is likely *per se* unconstitutional. *See Mahan v. Howell*, 410 U.S. 315, 329 (1973); Br. for Appellants at 47 n.8; Part II, *infra*. Accordingly, Texas is probably unable to justify Plan S172 under any standard of review, much less under strict scrutiny.

another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?" *Id.* at 379. In order to prevent this vote dilution and ensure equal participation in the electoral process, the Equal Protection Clause guarantees that "[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote – whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." *Id.*

One year later, this Court made it clear that the "right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). In *Reynolds*, residents of Jefferson County, Alabama, challenged the apportionment of seats in the Alabama Legislature. *Id.* at 540. Specifically, the plaintiffs alleged that, due to uneven growth in population in certain districts, the failure to reapportion representatives in nearly sixty years diluted the voting power of some voters. *Id.* Relying on the reasoning in *Gray*, this Court reaffirmed the principle that "voters cannot be classified, constitutionally, on the basis of where they live." *Id.* at 565. As a result, the Court held that the Constitution required Alabama to reapportion its districts because "[t]he fact that an individual lives here or there is not a legitimate

reason for overweighting or diluting the efficacy of his vote." *Id.* at 567.

Like *Gray* and *Reynolds*, Plan S172 dilutes the value of votes based solely on where a voter lives. Before the district court, Appellants demonstrated that the redistricting scheme dilutes the votes of those living in Appellants' districts because there are substantially more citizens and registered voters in those districts than in other districts. *See* Jurisdictional Statement App. 27a-30a. For example, Senate District 1, where Plaintiff Sue Evenwel lives, has 573,895 citizens of voting age, which is over 200,000 more than the senate district with the fewest number of adult citizens. Jurisdictional Statement App. 28a. Therefore, in order to guarantee an election of a candidate of their choice, voters in Senate District 1 would need to cast 286,947 votes in favor of that candidate. Voters in the district with the fewest number of citizens, however, only need to cast 186,211 votes to elect the candidate of their choice, which is less than the difference in number of voting age citizens between the two districts. *See Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 780 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part) ("Since it takes a majority in each district to elect a supervisor, this means that the supervisor from District 1 can be elected on the basis of 353,826 votes (less than the *difference* between the two districts). . . ." (emphasis in original)).

Senate District 4, where Plaintiff Edward Pfenninger lives, has 533,010 citizens of voting age,

over 160,000 more than the senate district with the fewest number of adult citizens. Jurisdictional Statement App. 30a. Although not as egregious as Senate District 1, Senate District 4 still requires more votes to guarantee a candidate's election than in the lowest district.[3] But as this Court said in *Reynolds*, "[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable." 377 U.S. at 563; *Wesberry*, 376 U.S. at 8 ("To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People.'"). Instead, the Fourteenth Amendment requires that "all voters, as citizens of a State, stand in the same relation regardless of where they live." *Reynolds*, 377 U.S. at 565. "[T]hose qualified to vote have the right to an equally effective voice in the election process" and if "the votes of some residents have greater weight than those of others . . . the equal protection of the laws has been denied." *Avery v. Midland Cnty., Tex.*, 390 U.S. 474, 480-81 (1968). "Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired

---

[3] At the very least, this deviation is prima facie evidence that the redistricting scheme is diluting the effectiveness of Appellants' votes. *See Brown v. Thomson*, 462 U.S. 835, 852 (1983) ("We have come to establish a rough threshold of 10% maximum deviation from equality . . . below that level, deviations will ordinarily be considered de minimis.").

when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State." *Reynolds*, 377 U.S. at 568.

Plan S172 impairs the right to vote of the voters living in Senate Districts 1 and 4 by diluting the effectiveness of their votes. As this Court has made clear, such an apportioning scheme violates the Equal Protection Clause of the Fourteenth Amendment. "[T]he basic principle of representative government remains, and must remain, unchanged – the weight of a citizen's vote cannot be made to depend on where he lives." *Reynolds*, 377 U.S. at 567. Accordingly, this Court should reverse the judgment of the district court in order to ensure that all Texas voters have an equal voice in their government.

III. NO OTHER LEGISLATIVE CONSIDERATIONS CAN JUSTIFY A DIMINISHMENT OF A CITIZEN'S FUNDAMENTAL RIGHT TO VOTE.

A final reason this Court should reverse the judgment of the district court is because the judgment allows a legislature, when redistricting, to elevate other considerations above a citizen's fundamental right to vote. Although this Court has repeatedly held that the right to vote is diminished when a citizen's voting power is diluted solely based on where he or she lives, *Reynolds*, 377 U.S. at 567, it has never expressly articulated that voting districts must be apportioned based on the Citizen Voting Age Population

("CVAP")[4] of each district. In fact, it appears that this Court has left open the question of what population base a state must use when apportioning districts. *Burns v. Richardson*, 384 U.S. 73, 91 (1966) (Stating that the Court "carefully left open the question what population" base should be used when apportioning districts.); *Hadley*, 397 U.S. at 58 n.9 (Stating that there was "no need to decide" the question of what population should be used when apportioning districts "at this time. . . ."). This Court's previous precedents, however, have made clear that the right to vote is a right that belongs to citizens and that the "one person, one vote" principle requires the electoral equality of citizens to be elevated over considerations of those not eligible to vote. Accordingly, the logical conclusion is that the Fourteenth Amendment requires states to apportion districts based on the number of citizens of voting age.

This Court's opinions set out a long-standing principle that the "one person, one vote" principle of the Fourteenth Amendment protects the electoral equality of citizens. "Citizens, not history or economic interests, cast votes." *Reynolds*, 377 U.S. at 580. As Judge Kozinski said in his opinion in *Garza*, "[i]t is very difficult . . . to read the Supreme Court's

---

[4] The U.S. Census Bureau estimates CVAP through its ongoing American Community Survey. *See* U.S. Census Bureau, *American Community Survey*, *available at* http://www.census.gov/acs/www/about_the_survey/american_community_survey/ (last visited August 6, 2015).

pronouncements in this area without concluding that what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation." 918 F.2d at 782 (Kozinski, J., concurring in part and dissenting in part). The principle of electoral equality recognizes that persons eligible to vote "hold the ultimate political power in our democracy," and is served by apportionment by proportion of eligible voters. *Id.* at 781.

As demonstrated above, this Court's decisions recognize that the right to vote is a fundamental right held by citizens, and the right to vote is diminished when "the votes of *citizens*" are weighed "differently, by any method or means." *Reynolds*, 377 U.S. at 563 (emphasis added). The justification for this Court's holding in *Reynolds* was that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." *Id.* at 567. The principle of electoral equality was also reflected in nearly all of this Court's "one person, one vote" cases. *See Gray*, 372 U.S. at 381 ("[O]nce the class of voters is chosen and their qualifications specified, we see no constitutional way by which *equality of voting power* may be evaded." (emphasis added)); *Morris*, 489 U.S. at 698 ("a *citizen* is . . . shortchanged if he may vote for only one representative when *citizens* in a neighboring district, of equal population, vote for two. . . ." (all emphasis added)); *Harper*, 383 U.S. at 668 ("The principle that denies the State the right to dilute a *citizen's vote* on account of his economic status or other such factors by analogy bars a system which excludes those

unable to pay a fee to vote or who fail to pay." (emphasis added)); *Chapman*, 420 U.S. at 24 ("All *citizens* are affected when an apportionment plan provides disproportionate voting strength. . . ." (emphasis added)); *Lockport*, 430 U.S. at 265 ("[A]ll *citizens* have an equal interest in representative democracy, and . . . the concept of equal protection therefore requires that *their votes* be given equal weight." (all emphasis added)); *Hadley*, 397 U.S. at 52 ("[A] *qualified voter* has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted." (emphasis added)). Accordingly, as this Court has recognized, "total population, even if absolutely accurate as to each district when counted, is nevertheless not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan." *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973).

Even *Burns*, wherein this Court stated that the question of relevant population base was left open, reaffirms the principle of electoral equality. 384 U.S. at 91. In that case, this Court upheld a Hawaii State House redistricting plan that apportioned representatives by voter registration statistics rather than total population. *Id.* at 90. Hawaii adopted this plan because the large population of military personnel and tourists resulted in a large number of non-voters on Oahu. *Id.* at 94. The Court upheld Hawaii's decision to rely on voter population to apportion districts because "[t]otal population figures may thus constitute a substantially distorted reflection of the

distribution of state citizenry." *Id.* As stated by Judge Kozinski "[w]hile *Burns* does not, by its terms, purport to require that apportionments equalize the number of qualified electors in each district, the logic of the case strongly suggests that this must be so." *Garza*, 918 F.2d at 784 (Kozinski, J., concurring in part and dissenting in part). When this Court's Equal Protection Clause cases are read together, it is clear that the Constitution prevents redistricting plans that result in disproportionate electoral power.

The principle of electoral equality is also reflected in this Court's cases involving Section 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973. In *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986), this Court suggested that vote dilution under Section 2 of the VRA should be examined by looking at the number of eligible voters in an area. This Court emphasized that courts must look to voting power of racial groups in order to determine whether a government has unlawfully diluted their right to vote. *Id.* at 49-51. Thus, *Gingles* suggested that voters are the relevant demographic for courts to look at when determining whether vote dilution has occurred.[5]

---

[5] Although the VRA enforces the Fifteenth Amendment, there is no fundamental difference between the right to vote protected by the Fifteenth Amendment and the right to vote protected by the Equal Protection Clause of the Fourteenth Amendment. *Reynolds*, 377 U.S. at 557-58 ("[A]ll who participate in the election are to have an equal vote – whatever their race. . . ."); U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the

(Continued on following page)

As a result of *Gingles*, most circuits recognize the principle of electoral equality when analyzing vote dilution under Section 2 of the VRA. *See Barnett v. City of Chicago*, 141 F.3d 699, 704-05 (7th Cir. 1998); *Campos v. City of Houston,*, 113 F.3d 544, 548 (5th Cir. 1997); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1567-69 (11th Cir. 1997); *Romero v. City of Pomona*, 883 F.2d 1418, 1418-28 (9th Cir. 1989), *abrogated on other grounds by Townsend v. Holman Consulting Corp.*, 929 F.2d 1358 (9th Cir. 1990). For example, in *Negron*, the Eleventh Circuit reasoned that:

> In order to elect a representative or have a meaningful potential to do so, a minority group must be composed of a sufficient number of voters or of those who can readily become voters through the simple step of registering to vote. In order to vote or to register to vote, one must be a citizen.

113 F.3d at 1569. Because voting power can only come from those eligible to vote, the Eleventh Circuit held that CVAP was the relevant statistic for a court to

---

United States or by any State on account of race, color, or previous condition of servitude."). Both amendments ensure that citizens have relatively equal voting power when electing representatives. *See Gray*, 372 U.S. at 381 (comparing the "conception of political equality" in the Fourteenth and Fifteenth Amendments).

determine whether a minority group's right to vote had been unlawfully diluted. *Id.* at 1569.[6]

The Seventh Circuit, in *Barnett*, expanded the reasoning of *Negron* and stated that:

> Neither the census nor any other policy or practice suggests that Congress wants noncitizens to participate in the electoral system as fully as the concept of virtual representation would allow, although permanent resident aliens are permitted to make federal campaign contributions, 2 U.S.C. § 441e, as are certain other nonvoters.

141 F.3d at 704. Because "[t]he right to vote is one of the badges of citizenship. The dignity and very concept of citizenship are diluted if noncitizens are allowed to vote either directly or by the conferral of additional voting power on citizens believed to have a community of interest with the noncitizens." *Id.* As a result, the Seventh Circuit agreed that "citizen voting-age population is the basis for determining equality of voting power." *Id.*

In 2009, this Court once again examined the issue of what metric to use to determine vote dilution in VRA Section 2 cases. *Bartlett v. Strickland*, 556 U.S. 1 (2009). In *Bartlett*, a plurality of this Court

---

[6] The Eleventh Circuit clarified that the use of CVAP is necessary "only where there is reliable information indicating a significant difference in citizenship rates between the majority and minority populations." *Id.*

stated that courts examining Section 2 claims must determine if "minorities make up more than 50 percent of the voting-age population in the relevant geographic area[.]" *Id.* at 18 (plurality opinion). Although this wording implies that courts should look at voting age population ("VAP"), rather than CVAP, to determine if there is vote dilution, the opinion also made reference to CVAP and, more importantly, reaffirmed the principle of electoral equality.[7] *Id.* at 19 ("The special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district.").

Only two circuits have examined the issue after *Bartlett*. *See Reyes v. City of Farmers Branch*, 586 F.3d 1019 (5th Cir. 2009); *Pope v. County of Albany*, 687 F.3d 565 (2d Cir. 2012).[8] In *Reyes*, the Fifth Circuit held that *Bartlett* did not require courts to abandon CVAP as the proper metric for determining

---

[7] Furthermore, it appears that there was not a significant difference between the voting age population and the citizen voting age population in *Bartlett*. *Id.* at 9.

[8] The Eleventh Circuit also recently decided an appeal in a VRA Section 2 case. *Ga. State Conference of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1339 (11th Cir. 2015). The court, however, did not "address any issues related to the merits" and instead held that the district court's granting of a motion for summary judgment was improper and remanded the case to the district court for trial. *Id.* at 1348-49.

minority vote dilution. 586 F.3d at 1023-24. In *Pope*, the Second Circuit used VAP to determine whether a VRA Section 2 violation had occurred, but the court noted that both parties relied on VAP and, as a result, the court did not have to examine the issue of CVAP. 687 F.3d at 573 n.6. Therefore, for the most part, the circuit courts have consistently held that CVAP is the proper metric to use to determine whether vote dilution has occurred in VRA Section 2 cases. In these cases, the circuit courts recognize that the principle of electoral equality is a necessary aspect of the fundamental right to vote.

The circuit courts, however, have taken a different view when it comes to vote dilution under the "one person, one vote" principle. *Chen v. City of Houston*, 206 F.3d 502 (5th Cir. 2000). Although the Fifth Circuit did not hold that the Fourteenth Amendment requires voting districts to be divided by total population, it did reject plaintiffs' argument that "[s]ince [a 'one person, one vote'] inquiry focuses on the dilution of *votes*, it would be improper to allow the votes of two adult citizens to be weighed equally with the vote of a single adult citizen merely because the latter happened to live in proximity to a noncitizen ineligible to vote." *Id.* at 523 (emphasis in original). Instead, the court ruled that "the choice of population figures is a choice left to the political process." *Id.* The court ruled this way despite stating, three years earlier, that CVAP must be used for VRA Section 2 claims because "only voting-age persons who are

United States citizens can vote." *Campos*, 113 F.3d at 548.[9]

The Ninth Circuit has also inconsistently applied the concept of electoral equality. The Ninth Circuit has held that the "one person, one vote" principle requires voting districts to be divided by total population. *Garza*, 918 F.2d at 773-76. Astonishingly, the court expressly rejected the principle of electoral equality and stated that using CVAP would "dilute the access of voting age citizens in that district to their representative." *Id.* at 775. The Ninth Circuit elevated representational equality over electoral equality despite acknowledging the importance of electoral equality in its VRA Section 2 cases. *See Romero*, 883 F.2d 1418, 1426 (citing *Gingles v. Edmisten*, 590 F. Supp. 345, 381 (E.D.N.C. 1984), for the proposition that "for purposes of determining minority vote dilution, 'effective voting majority' [is the] appropriate standard").[10]

---

[9] The Fourth Circuit has also held that the "one person, one vote" principle does not require voting districts to be divided in a certain way. *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996). Although the Fourth Circuit did not contradict itself regarding the principle of electoral equality in VRA Section 2 cases, its decision still adds to the uncertainty of how to properly protect the right to vote from vote dilution.

[10] The Second Circuit has been more consistent, although it has never explicitly held that the "one person, one vote" principle requires electoral equality. *See Roxbury Taxpayers Alliance v. Delaware Cnty. Bd. of Sup'rs*, 80 F.3d 42, 47 (2d Cir. 1996) ("When representatives are elected from districts of equal populations,

(Continued on following page)

The Ninth Circuit's analysis in *Garza* is unpersuasive because this Court has stated that other concerns, such as access to a representative, are secondary to ensuring electoral equality. *Reynolds*, 377 U.S. at 580. In *Reynolds*, this Court rejected Alabama's argument that concerns over access to representatives required unequal districts:

> Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

Id. Fifty years later, concerns about access are even more unconvincing. Technology has made it easier to communicate with one's representatives and their staff. Furthermore, legislative staff provide many valuable services to constituents, allowing a representative to meet the needs of the constituents without having to meet with the constituent in person. *See* Ron Lieber, *When to Call Your Elected Representatives*

---

each citizen enjoys the right to his or her fair share of representation on the body comprising those representatives. . . .").

for Help, N.Y. Times, October 20, 2012, at B1, *available at* http://www.nytimes.com/2012/10/20/your-money/how-senators-and-representatives-can-help-constituents.html?module=ArrowsNav&contentCollection=Your%20Money&action=keypress&region=FixedLeft&pgtype=article.

Likewise, one's right to petition the government is not infringed by dividing districts by number of citizens of voting age. Scot A. Reader, *One Person, One Vote Revisited: Choosing A Population Basis to Form Political Districts*, 17 Harv. J.L. & Pub. Pol'y 521, 543 (1994) ("Because equally-weighted voting does not target expression in the forum of petitioning representatives, these rationales are inapposite"); Br. for Appellants at 37-41. Therefore, one's access to a representative is not significantly diminished if one district has a greater total population than another. On the other hand, districts with unequal amounts of voters infringe on a citizen's fundamental right to vote. *See* Scot Reader, 17 Harv. J.L. & Pub. Pol'y at 543 ("Unlike access, voting is a zero-sum game."). Accordingly, this Court must protect the right to vote and ensure electoral equality among citizens of different districts.[11]

---

[11] Even when this Court has suggested that representational equality is important, it has always reaffirmed the paramount importance of electoral equality. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) ("Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."); *see also* Timothy Mark Mitrovich, Comment, *Political Apportioning is not a Zero-Sum Game: The Constitutional Necessity of*

(Continued on following page)

Courts have consistently used CVAP when analyzing vote dilution under the VRA, but no circuit has held that CVAP is the proper metric to use to determine whether a government has diluted a citizen's vote under the "one person, one vote" principle. Like the district court below, these courts only recognize the principle of electoral equality in some cases. This Court's cases, however, have consistently reflected the principle of electoral equality. In order to reaffirm that principle, this Court must reverse the judgment of the district court and hold that a redistricting scheme must ensure electoral equality of citizens.

Apportioning Districts to be Equal in Terms of Both Total Population and Citizen Voter-Age Population, 77 Wash. L. Rev. 1261, 1293 (2002) (arguing that the Fourteenth Amendment requires both electoral equality and representational equality). Therefore, even if Texas wishes to seek representational equality through redistricting, it must also seek to achieve electoral equality. Texas, however, failed to provide a justification for why it did not seek to apportion districts in a way that would achieve equality in total population and CVAP. *See* Br. for Appellants at 46 ("As a mathematical matter, 'it is possible to devise a number of feasible alternative 31-district plans with different combinations of total population and CVAP deviations,' including at least one plan 'that eliminate[s] the gross deviations in CVAP without significantly exceeding the 8.04% total population deviation from the ideal in Plan S172.'" (quoting Jurisdictional Statement Supp. App. at 2-3)).

CONCLUSION

This Court has repeatedly protected the fundamental right to vote of all citizens by ensuring that each citizen has the same electoral power as other citizens, regardless of where he or she lives. The district court failed to adequately protect the right to vote of all Texas voters and its decision diminishes the voting power of citizens in Appellants' districts. In order to ensure that no individual's right to vote is diminished, this Court should reverse the judgment of the district court and hold that states must apportion legislative districts equally based upon citizens of voting age.

Dated this 7th day of August 2015.

Respectfully submitted,

STEVEN J. LECHNER
Counsel of Record
JEFFREY W. MCCOY
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
jmccoy@mountainstateslegal.com

Attorneys for Amicus Curiae

Supreme Court, U.S.
FILED
SEP 25 2015
OFFICE OF THE CLERK

No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, EDWARD PFENNINGER,
Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF *AMICUS CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEES

SHERRILYN IFILL
Director-Counsel
JANAI NELSON
CHRISTINA SWARNS
LEAH C. ADEN
LILIANA ZARAGOZA
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, N.Y. 10006

COTY MONTAG
JOHN PAUL SCHNAPPER-CASTERAS
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 I Street N.W.
Washington, DC 20005

WALTER DELLINGER
(*Counsel of Record*)
wdellinger@omm.com
BRADLEY N. GARCIA
JASON ZARROW
O'MELVENY & MYERS LLP
1625 Eye Street, N.W
Washington, D.C. 20006
(202) 383-5300

DANIELLE C. GRAY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. APPELLANTS' PROPOSAL IS AN ABRUPT DEPARTURE FROM LONGSTANDING PRACTICE AND PRECEDENT 7

A. *Reynolds* Protects Equal Access to Representation 8

B. Consistent Precedent and Practice Confirm That *Reynolds* Protects Equal Access to Representation 11

II. APPELLANTS' PROPOSAL WOULD FENCE OUT HISTORICALLY DISFAVORED AND UNDERSERVED COMMUNITIES, AND THERFORE RAISES CONSTITUIONAL CONCERNS. 13

A. This Court's Jurisprudence Protects Against the Fencing Out of Select Communities. 15

B. Appellants' Proposal Does Not Have a Constitutional Value That Justifies Its Deleterious Effect on Representational Equality. 23

TABLE OF CONTENTS
(continued)

Page

III. THERE IS NO CONFLICT BETWEEN ONE PERSON, ONE VOTE AND SECTION 2 OF THE VOTING RIGHTS ACT. 25

A. In Principle, There Is No Conflict Between One Person, One Vote and Section 2..... 26

B. In Practice, There Is No Conflict Between One Person, One Vote and Section 2..... 29

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

Abate v. Mundt,
403 U.S. 182 (1971) 22, 23, 33

Anderson v. Celebreeze,
460 U.S. 780 (1983) 16

Barnett v. City of Chi.,
141 F.3d 699 (7th Cir. 1998) 30

Bartlett v. Strickland,
556 U.S. 1 (2009) 28, 30

Bd. of Estimate of City of N.Y. v. Morris,
489 U.S. 688 (1989) 11, 24

Beer v. United States,
425 U.S. 130 (1976) 2

Branch v. Smith,
538 U.S. 254 (2003) 32

Brown v. Thomson,
462 U.S. 835 (1983) 32, 33

Burns v. Richardson,
384 U.S. 73 (1966) ..... *passim*

Bush v. Vera,
517 U.S. 952 (1996) 1, 34

Calderon v. City of L.A.,
481 P.2d 489 (Cal. 1971) 13

Carrington v. Rash,
380 U.S. 89 (1965) 15

Chapman v. Meier,
420 U.S. 1 (1975) 31

TABLE OF AUTHORITIES
(continued)

Page

Chen v. City of Houston,
206 F.3d 502 (5th Cir. 2000) 32

Chisom v. Roemer,
501 U.S. 380 (1991) 1

Dillard v. Chilton Cty. Bd. of Educ.,
699 F. Supp. 870 (M.D. Ala. 1988), *aff'd*,
868 F.2d 1274 (11th Cir. 1989) 32

Dillard v. Town of Louisville,
730 F. Supp. 1546 (M.D. Ala. 1990) 32

Easley v. Cromartie,
532 U.S. 234 (2001) 1

Ely v. Klahr,
403 U.S. 108 (1971) 18, 23

Fabela v. City of Farmers Branch, Tex.,
No. 10-1425, 2012 WL 3135545 (N.D.
Tex. Aug. 2, 2012) 31

Fairley v. Hattiesburg, Miss.,
584 F.3d 660 (5th Cir. 2009) 31

Forston v. Dorsey,
379 U.S. 433 (1965) 29

Gaffney v. Cummings,
412 U.S. 735 (1973) 4, 10, 12, 29

Garza v. Cty. of L.A.,
918 F.2d 763 (9th Cir. 1990) 31

Georgia v. Ashcroft,
539 U.S. 461 (2003) 1

TABLE OF AUTHORITIES
(continued)

Page

Gomillion v. Lightfoot,
364 U.S. 339 (1960) 2, 5, 15

Gray v. Sanders,
372 U.S. 368 (1963) 22

Hadley v. Junior Coll. Dist.,
397 U.S. 50 (1970) 23

Harper v. Va. State Bd. of Elections,
383 U.S. 663 (1966) 15

Holder v. Hall,
512 U.S. 874 (1994) 31, 33

Johnson v. DeGrandy,
512 U.S. 997 (1994) 28, 30

Karcher v. Daggett,
462 U.S. 725 (1983) 19

Kirkpatrick v. Preisler,
394 U.S. 526 (1969) 10, 27, 33

Kobach v. Election Assistance Comm'n,
772 F.3d 1183 (10th Cir. 2014) 21

League of United Latin Am. Citizens (LULAC) v. Perry,
548 U.S. 399 (2006) 1, 28, 30

Lodge v. Buxton,
639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982) 27

Miller v. Johnson,
515 U.S. 900 (1995) 34

TABLE OF AUTHORITIES
(continued)

Page

Montes v. City of Yakima,
40 F. Supp. 3d 1377 (E.D. Wash. 2014) 34

Nipper v. Smith,
39 F.3d 1494 (11th Cir. 1994) 33

Nw. Austin Mun. Util. Dist. No. One v. Holder,
557 U.S. 193 (2009) 1

Reynolds v. Sims,
377 U.S. 533 (1964) ..... *passim*

Richardson v. Ramirez,
418 U.S. 24 (1974) 20

Romer v. Evans,
517 U.S. 620 (1996) 16

Shaw v. Hunt,
517 U.S. 899 (1996) 1, 31, 34

Shelby Cty., Ala. v. Holder,
133 S. Ct. 2612 (2013) 1

Smith v. Allwright,
321 U.S. 649 (1944) 2

South Carolina v. Katzenbach,
383 U.S. 301 (1966) 27

Terry v. Adams,
345 U.S. 461 (1953) 2

Thornburg v. Gingles,
478 U.S. 30 (1986) 1, 28, 29, 30

United States v. Hays,
515 U.S. 737 (1995) 1

TABLE OF AUTHORITIES
(continued)

Page

Valdespino v. Alamo Heights Indep. Sch. Dist.,
168 F.3d 848 (5th Cir. 1999) 30

Veasey v. Abbott,
796 F.3d 487 (5th Cir. 2015) 22

Voinovich v. Quilter,
507 U.S. 146 (1993) 27, 31

Wesberry v. Sanders,
376 U.S. 1 (1964) 12

Whitcomb v. Chavis,
403 U.S. 124 (1971) 8, 24

White v. Regester,
422 U.S. 935 (1975) 2

White v. Weiser,
412 U.S. 783 (1973) 31

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 1, 27

STATUTES

52 U.S.C. § 10301 ..... 27, 28

OTHER AUTHORITIES

Alan Huffman, *How White Flight Ravaged the Mississippi Delta*, The Atlantic (Jan. 6, 2010), *available at* http://www.theatlantic.com/business/archive/2015/01/how-white-flight-ruined-the-mississippi-delta/384227 18

TABLE OF AUTHORITIES
(continued)

Page

Brennan Center for Justice at NYU School of Law, Citizens Without Proof (2006), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf 22

Brief for Petitioners, *Gomillion v. Lightfoot*, 364 U.S. 339, 1960 WL 98593 (Aug. 25, 1960) 15

Brief for the United States in Opposition, *Cty. of L.A. v. Garza*, 498 U.S. 1028 (1991) (No. 90-849) 12

Christopher Uggen et al., *State-Level Estimates of Felon Disenfranchisement in the United States, 2010* (July 2012), *available at* http://sentencingproject.org/doc/ publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf 17, 20, 21

Cong. Globe, 39th Cong., 1st Sess. 2767 (1866) 11

Controversies in Minority Voting: The Voting Rights Act in Perspective 31 (Bernard Grofman & Chandler Davidson, eds. 1992) 8

Ctrs. for Disease Control and Prevention, *Healthy life expectancies at age 65 highest in Hawaii, lowest in Mississippi* (July 18, 2013), *available at*

TABLE OF AUTHORITIES
(continued)

Page

http://www.cdc.gov/media/releases/2013/p0718-life-expectancy.html 18

David C. Saffell, *Reapportionment and Public Policy: State Legislators' Perspectives*, 9 Poly. Stud. J. 916 (1981) 17

Developments in the Law, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L. Rev. 1939 (2002) 20

J. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 Mich. L. Rev. 1 (1984) 9, 16

J. Douglas Smith, *On Democracy's Doorstep* 47 (2014) 8, 9

Jim Bennett, Alabama Secretary of State, *Bennett Says Alabama will Implement Voter Citizenship Requirement* (Dec. 19, 2014) 21

Joseph Fishkin, *Weightless Votes*, 121 Yale L.J. 1888 (2012) 7, 24

K. Johnson, *Demographic Trends in Rural and Small Town America* (Carsey Inst., Univ. of New Hampshire, 2006), *available at* http://scholars.unh.edu/cgi/viewcontent.cgi?article=1004&context=carsey 10

Kimball W. Brace, Final Report of the 2004 Election Day Survey (2005) 19

TABLE OF AUTHORITIES
(continued)

Page

M. McCubbins & T. Schwartz, *Congress, the Courts, and Public Policy: Consequences of the One Man, One Vote Rule*, 32 Am. J. Pol. Sci. 388 (1988) 10

Nat'l Cts. for Educ. Statistics, Children Living in Poverty, *available at* https://nces.ed.gov/programs/coe/pdf/coe_cce.pdf 18

U.S. Census, Growth in Urban Population Outpaces Rest of Nation, Census Bureau Reports (Mar. 26, 2012), *available at* https://www.census.gov/newsroom/releases/archives/2010_census/cb12-50.html 16

U.S. Census, Tbl. 2, Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age (Nov. 2014), *available at* https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2014/tables.html 17

U.S. Census, Tbl. 29, Population by Sex and Age, for Black Alone or in Combination and White Alone, Not Hispanic (2012), *available at* https://www.census.gov/population/race/data/ppl-bc12.html 17

TABLE OF AUTHORITIES
(continued)

Page

Uggen & Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 Am. Soc. Rev. 777 (2002) 21

Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 Case W. Res. L. Rev. 727 (1998) 20

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV, § 1 13

INTEREST OF *AMICUS CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit legal organization, founded in 1940 under the leadership of Thurgood Marshall to achieve racial justice and ensure the full, fair, and free exercise of constitutional and statutory rights for Black people and other communities of color.

Because equality of political representation is foundational to our democracy, and the franchise is "a fundamental political right . . . preservative of all rights," *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), LDF has worked for nearly a century to combat threats to equal political participation. Indeed, LDF has been involved in nearly all of the precedent-setting cases regarding minority political representation and voting rights before federal and state courts. *See, e.g.*, *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009); *League of United Latin Am. Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006); *Georgia v. Ashcroft*, 539 U.S. 461 (2003); *Easley v. Cromartie*, 532 U.S. 234 (2001); *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *United States v. Hays*, 515 U.S. 737 (1995); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Beer v. United States*,

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consent letters with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

425 U.S. 130 (1976); *White v. Regester*, 422 U.S. 935 (1975) (per curiam); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944). Consequently, LDF has a significant interest in ensuring the full, proper, and continued enforcement of both the United States Constitution and the federal statutes guaranteeing full political participation, including the Voting Rights Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal seeks to redefine the constitutional doctrine of one person, one vote, and to upend decades of settled practice and precedent applying it. Since its recognition in *Reynolds v. Sims*, 377 U.S. 533 (1964), the one person, one vote doctrine has helped realize the constitutional promise of inclusive and equal access to this nation's representative institutions by guarding against vote dilution and ensuring that *everyone* in the population is counted when legislative districts are drawn. Ensuring state legislative districts are "as nearly of equal population as is practicable" is essential to "the basic aim of legislative apportionment": "*equal representation for equal numbers of people*, without regard to race, sex, economic status, or place of residence within a State." *Id.* at 560-61 (emphasis added).

In the half-century since *Reynolds* was announced, States have overwhelmingly sought to comply with the Equal Protection Clause by drawing legislative districts with equal *total* population. This Court has repeatedly approved that approach, and for good reason: Creating legislative districts with equal total populations fosters equal access to elec-

toral representation and constituent services, regardless of race, class, citizenship status, zip code, or other characteristics. Moreover, using total population rightly effectuates an inclusive vision of representative government in America. It permits all residents—including those who are disproportionately not yet registered to vote or who are temporarily or permanently disfranchised—to be meaningfully represented in their state and local legislative bodies. This is particularly important for underserved communities and individuals for whom access to elected representatives may be a lifeline to essential public works and constituent services.

This inclusive understanding of electoral democracy is a direct response to this country's unfortunate history of electoral exclusion. Prior to *Reynolds*, such nefarious, discriminatory, and disfranchising tactics as literacy tests, poll taxes, and outright prohibitions on suffrage caused Blacks and other racial minorities to be discounted in electoral districting and ignored by state representatives in the making of important policy decisions that impact community members' daily lives. It is only through the Civil War, key constitutional amendments, decades of litigation, and other advocacy that our country has begun to overcome these obstacles to equal access to representation.

Against this doctrinal and historical backdrop of struggle for a more inclusive democracy, Appellants advance a regressive and unprecedented interpretation of districting and constitutional law. They contend that the conclusion repeatedly reached by this Court and the vast majority of States—that "total population" means total population—is wrong. Instead, Appellants assert that the Fourteenth

Amendment *requires* States to *count out* millions of people to "equaliz[e]" the number of "eligible voters" in each electoral district. Appellants' Br. 45. Both what "eligible voter" means and how Appellants' assertion bears any relation to this Court's case law are conspicuously undefined and ill-founded.

Reynolds offers no support for Appellants' proposal because it "dealt with more than the statistical niceties involved in equalizing individual voting strength." *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973). *Reynolds* aimed to ensure "fair and effective representation," not some mathematical conception of an "equal vote," and "it was for that reason that the decision insisted on substantial equality of populations among districts." *Id.* (citation omitted). There also is no support for Appellants' position in the text of the Fourteenth Amendment (which guarantees equal protection to "any person," not "citizens," much less "voting citizens"), in any of this Court's decisions (which have explicitly and implicitly endorsed total-population districting for decades), or in any analogous State practice (which has for more than 50 years treated total population as the relevant apportionment metric). Indeed, it is difficult to identify any constitutional value that Appellants' proposal would serve.

But Appellants' theory would impose clear and considerable costs. Treating "non-voters" as invisible when drawing electoral boundaries, and therefore as unequal for purposes of representational access, would significantly harm minority communities, which are proportionally more likely to include "non-voters" such as disfranchised persons, children, immigrants, and other persons who are not yet registered or eligible to vote, many of whom are bur-

dened by increasingly onerous registration and voting requirements. Elected officials would have little incentive to be responsive to individuals who are "invisible" for apportionment purposes, particularly as districts are expanded and redrawn to make up for those who are counted *out* under Appellants' theory. As a result, vast segments of society would be fenced out of American political life and the clock would turn back to before *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and this Court's commitment to make democratic institutions more open, inclusive, and representative.

Appellants' nebulous theory of an "eligible voter" also is harmful because it hinges on the use of voting population statistics that are "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation" of specific groups. *Burns v. Richardson*, 384 U.S. 73, 92-93 (1966). Given the manipulability of voter eligibility—through such familiar means as voter registration restrictions and felon disfranchisement laws—Appellants' proposal would create perverse incentives to excise communities from the "eligible voter" population, perpetuating the types of representative inequalities that necessitated decisions like *Gomillion* and *Reynolds*. For these reasons, and others set forth below, Appellants' exclusionary proposal limiting apportionment to the imprecise and malleable category of "eligible voters" should be approached with great caution, and is, under no circumstances, constitutionally required. Indeed, this case is an inappropriate vehicle to determine if and when apportionment bases other than total population might be constitutionally permissible. There is no legislative record to allow the Court to assess the potential jus-

tifications for, or pitfalls of, that type of approach, and the Court should not attempt to provide guidance on that important question in the abstract.

Finally, a handful of *amici* supporting Appellants suggest that this Court should revamp its case law to avoid an imagined collision between the use of total population under one person, one vote and the creation of majority-minority districts under Section 2 of the Voting Rights Act ("VRA"). This collision is illusory. The plain fact is that States and localities have readily complied with both complementary commands for over 50 years, and Appellants' *amici* identify *no case* that has ever suggested the two requirements are somehow incompatible. Nor is the absence of conflict surprising. One person, one vote and Section 2 of the VRA have different constitutional foundations and functions. The former governs *how many* people should be in a district to ensure all *individuals* have equal access to representation; the latter addresses *who* should be in each district to ensure *collective* voting opportunity for particular, protected groups. There is no logical basis to insist that such fundamentally different inquiries rest on identical demographic data, and both requirements leave States and localities with considerable discretion to accommodate these and other legitimate objectives.

This Court should reaffirm the constitutionality of States' established use of total population figures when drawing legislative districts. There is no reason to depart from settled law and longstanding practice, and many compelling reasons not to.

ARGUMENT

I. APPELLANTS' PROPOSAL IS AN ABRUPT DEPARTURE FROM LONG-STANDING PRACTICE AND PRECEDENT.

The one person, one vote principle was announced as a rule of representational equality, and it has been widely understood and applied as such for more than 50 years. Over that period, legislators have almost universally relied on total population figures to draw electoral districts that are "as nearly of equal population as is practicable." *Reynolds*, 377 U.S. at 577. Indeed, "line-drawers across the nation rely almost uniformly on total population," an approach "that has become the de facto national policy." Joseph Fishkin, *Weightless Votes*, 121 Yale L.J. 1888, 1890 (2012). This consistent and seldom-questioned practice is not just constitutionally permissible, but *instrumental* in securing the core constitutional promise of one person, one vote—inclusive and equal access to this nation's representative institutions.

In the face of that settled law and practice, Appellants advance a sweeping constitutional proposition under the guise of "equaliz[ing] the number of eligible voters in each [electoral] district." Appellants' Br. 45.[2] Other than excluding scores of people

---

[2] Indeed, as discussed below, *infra* Part II.A, it is not entirely clear what standard Appellants believe should be required to implement their proposal. Although they frame their argument in terms of "eligible voters," their preferred metric, citizen voting-age population ("CVAP"), Appellants' Br. 9, does not account for the millions of disfranchised individuals with felony convictions and many other citizens who may be ineligible to vote for any number of reasons. They also cite to registration data, *id.*, which is deeply problematic and often under-

for apportionment purposes, it is not clear what real-world interest Appellants' proposal would actually serve. As this Court has recognized, the "weight" of an individual vote is hard to define and affected by numerous factors other than a district's voting population. *See Whitcomb v. Chavis*, 403 U.S. 124, 145-46 (1971).

A. *Reynolds* Protects Equal Access to Representation.

Before *Reynolds*, legislative districts in many states were "little more than crazy quilts, completely lacking in rationality," 377 U.S. at 568, with urban areas often severely underrepresented relative to rural ones. For example, in 1960, districts in Connecticut's state house varied in population from 191 to 81,089; in Nevada, state senate districts varied from 568 to 127,016; and in California, one state senator represented six million residents of Los Angeles County while another represented 14,294 residents of three small counties. *See* J. Douglas Smith, *On Democracy's Doorstep* 47, 287 (2014).

Malapportionment was a particularly malignant tool for disfranchisement in the South before *Reynolds*. *See Controversies in Minority Voting: The Voting Rights Act in Perspective* 31 (Bernard Grofman & Chandler Davidson, eds. 1992) ("As post-Reconstruction historiography makes clear, one form of minority vote dilution employed by southern whites was malapportionment. . . . *Reynolds* destroyed this as a legal option for whites in the Deep

---

inclusive for other reasons. And, of course, neither CVAP nor registered voters has much to do with the concept of an "equal vote," which can be affected by voter turnout and barriers to registration.

South immediately before the Voting Rights Act enfranchised blacks there the following year."). In Georgia, for instance, just 1,876 people comprised the smallest house district, while the largest had a population of 185,422, roughly 100 times greater. Smith, *supra*, at 287.

As a result of such disparities, State policies tended to disproportionately serve the interests of sparsely populated rural areas, often at the expense of their more populous urban counterparts. As this Court summarized in *Reynolds*, "a nation once primarily rural in character [became] predominantly urban," and "[r]epresentation schemes once fair and equitable [became] archaic and outdated." 377 U.S. at 533.

Reynolds rejected these persistent representational imbalances, holding that, to avoid "schemes which give the same number of representatives to unequal numbers of constituents," *id.* at 563, "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." *Id.* at 568. "Legislators," this Court instructed, "represent people, not trees." *Id.* at 562. With that command, States redrew decades-old electoral boundaries, giving greater representation to urban areas whose political voices had previously been artificially muted. *See* J. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 Mich. L. Rev. 1, 91 (1984) (noting "immediately observable marked increases in urban and suburban representation" following *Reynolds*). Over time, government policies and programs that had disproportionately favored rural areas shifted to also accommodate urban interests. *See, e.g.*, M. McCubbins &

T. Schwartz, *Congress, the Courts, and Public Policy: Consequences of the One Man, One Vote Rule*, 32 Am. J. Pol. Sci. 388, 395-400, 409-12 (1988) (documenting such a shift in federal policy following one person, one vote cases). Put otherwise, the rule in *Reynolds* profoundly enhanced the representation and political access of urban communities—and, in so doing, of communities of color.[3]

Given that profound transformation, this Court was clearly correct when it observed that *Reynolds* "dealt with more than the statistical niceties involved in equalizing individual voting strength." *Gaffney*, 412 U.S. at 748. Rather, "*Reynolds* recognized that 'the achieving of fair and effective representation for all citizens is . . . the basic aim of legislative apportionment.'" *Id.* (quoting *Reynolds*, 377 U.S. at 565-66) (ellipsis in original). And "*it was for that reason* that the decision insisted on substantial equality of populations among districts." *Id.* (emphasis added). This Court did not mandate population equality to achieve some platonic mathematical ideal of an "equal vote," but to ensure fair and adequate access to representation to all persons within our nation's boundaries. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) ("Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power *and* diminution

---

[3] *See* K. Johnson, *Demographic Trends in Rural and Small Town America* 24, fig. 17 (Carsey Inst., Univ. of New Hampshire, 2006) ("[T]he proportion of the rural population that is non-Hispanic white (82 percent) is higher than in metropolitan areas (66 percent)."), *available at* http://scholars.unh.edu/cgi/viewcontent.cgi?article=1004&context=carsey.

of access to elected representatives.") (emphasis added).[4]

B. Consistent Precedent and Practice Confirm That *Reynolds* Protects Equal Access to Representation.

It is hardly surprising, then, that this Court has rejected Appellants' proposal to *mandate* a particular population metric and has instead permitted states to select from a range of approaches, including the near-universal practice of drawing districts by reference to total population. *See Burns*, 384 U.S. at 92.

That conclusion is confirmed by this Court's adjudication of case after case in which districts were drawn using total population metrics, without so much as a hint that the practice could be viewed as improper. *See Bd. of Estimate of City of N.Y. v. Morris*, 489 U.S. 688, 700 (1989) (discussing "formula that [the Court] ha[s] utilized without exception since 1971" and citing cases analyzing total population). Even when confronted with districts in which total population did not neatly mirror the voting population, this Court held only that such anomalies could *justify* districts with deviations from popula-

---

[4] Indeed, the goal of representational equality predates *Reynolds* and is consistent with the intent of the Fourteenth Amendment. For example, Senator Jacob Howard's comprehensive speech introducing that Amendment explained that "[t]he committee adopted numbers," *i.e.* total population, "as the most just and satisfactory basis, and this is the principle upon which the Constitution itself was originally framed, that the basis of representation should depend upon numbers. Numbers, not voters; numbers, not property; this is the theory of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 2767 (1866).

tion equality, *see Gaffney*, 412 U.S. at 746-47, or the use of alternative population measures, *see Burns*, 384 U.S. at 94-97; it never stated or implied that such circumstances *require* the use of a particular population metric. Appellants' failure to identify any such requirement in half a century of jurisprudence belies their newfound insistence that districts drawn using total population violate "their fundamental right to an equal vote." Appellants' Br. 18.

Finally, the validity of the total population benchmark is reinforced by the rules governing congressional redistricting. Article I, Section 2 *affirmatively requires* that congressional districts be drawn to equalize *total population*. *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964). That provision reflects the constitutional permissibility of basing political representation on total population, and not voters alone. Appellants have not explained why a constitutionally permissible metric for congressional apportionment is an inappropriate choice for state legislatures to rely on for their own districts.

And while this Court's subsequent cases have held that the equal population principle applies *more flexibly* at the state level, *see, e.g.*, *Gaffney*, 412 U.S. at 744-46, they have never suggested that "what is constitutionally required for apportionments for the House of Representatives is constitutionally forbidden in apportionments for state and local legislative bodies." Brief for the United States in Opposition at 16, *Cty. of L.A. v. Garza*, 498 U.S. 1028 (1991) (No. 90-849).

Rightly so. Total population represents the most inclusive and democratic basis for legislative apportionment—one that ensures equal access to repre-

sentation for all, without regard to the number of voters or non-voters in a given geographic area. It confers equal, meaningful representation on an individual who is not registered to vote, a sixteen-year-old child, a lawful permanent resident, and a disfranchised person. *See, e.g.*, *Calderon v. City of L.A.*, 481 P.2d 489, 493 (Cal. 1971) ("Adherence to a population standard . . . is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government."). For these reasons, apportionment using total population is fully faithful to the doctrine's purpose to expand "fair and effective representation for all," *Reynolds*, 377 U.S. at 565-66, and to the Fourteenth Amendment's guarantee of equal protection of the laws to "*any* person." U.S. Const. amend. XIV, § 1 (emphasis added).

II. APPELLANTS' PROPOSAL WOULD FENCE OUT HISTORICALLY DISFAVORED AND UNDERSERVED COMMUNITIES, AND THEREFORE RAISES CONSTITUTIONAL CONCERNS.

The Court need not, and should not, go any further than reaffirming States' authority to use total population as the basis for redistricting. This case does not require the Court to address whether, and when, States might be constitutionally permitted to utilize metrics focusing on "eligible voters" or any other metric apart from the total population standard Texas actually used. And the Court should not attempt to resolve that hypothetical and abstract question in this case. This case lacks any legislative record or other context that would allow for informed and informative guidance on when States might be permitted to deviate from total-population appor-

tionment. Nor does this Court, in the absence of a legislative record, have any basis for anticipating what constitutional issues might arise if a legislature were to abandon its historic practice of using a total population standard. In *Burns*, this Court held that the registered-voter metric used there was acceptable, despite the Court's serious reservations about its propriety, "*only because on th[at] record*" that approach was found to have produced a result "not substantially different from that which would have resulted from the use of a permissible population basis." 384 U.S. at 93 (emphasis added). The only record evidence in this case is a conclusory two-page declaration. Appellees' Br. 5-6. In short, *Burns* makes clear that evaluating the permissibility of non-population-based metrics requires a relevant record, and none exists here.

If the Court nonetheless attempts to provide guidance in this area, it should make clear that such voter-based metrics should be approached with great caution. In contrast to using total population for apportionment, a system that focuses on Appellants' nebulous definition of "eligible voters" would treat certain groups as invisible for purposes of legislative districting, and, by extension, as outsiders for purposes of democratic representation. Because the very concept of an "eligible voter" is difficult to define and devoid of a solid conceptual or statistical foundation, it is ripe for political manipulation. This potentially invidious combination of exclusion and political malleability raises sufficiently significant constitutional red flags that the use of "eligible voter" metrics cannot be required.

A. This Court's Jurisprudence Protects Against the Fencing Out of Select Communities.

Beginning with *Gomillion*, 364 U.S. at 339, the persistent trend in this Court's jurisprudence has been to make this country's representative institutions more open and inclusive, not less so. In *Gomillion*, this Court reviewed a challenge to the Alabama City of Tuskegee's borders, which had been redrawn "to remove from the city all save only four or five of its 400 negro voters while not removing a single white voter or resident." *Id.* at 341. This Court unanimously rejected the new boundaries, which it described as having the effect of "fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote." *Id.* "It is inconceivable," this Court affirmed, "that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Id.* at 345 (citation omitted); *see generally* Brief for Petitioners, *Gomillion v. Lightfoot*, 364 U.S. 339, 1960 WL 98593 at **11-12 (Aug. 25, 1960) (then-LDF counsel Robert L. Carter and others argued "'evasive schemes' designed to achieve the same result [as express prohibitions on voting qualifications or other geographic restrictions] are similarly forbidden [under the Fourteenth and Fifteenth Amendment]").

Following *Gomillion*, this Court's decisions have repeatedly rejected the "fencing out" of discrete groups from the political process, and explained that the Fourteenth Amendment mandates inclusive and accessible democratic institutions. *See, e.g.*, *Reynolds*, 377 U.S. at 560-61; *Carrington v. Rash*, 380 U.S. 89, 96 (1965); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 667 (1966). As this Court has

instructed, "[c]entral . . . to the . . . Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance." *Romer v. Evans*, 517 U.S. 620, 633 (1996). In other words, laws that tend to "fence out" discrete groups from access to representation and government are "not within our constitutional tradition." *Id.*

Reynolds and other, similar cases have barred the most blatant and overt forms of exclusion from the democratic process. But, as this Court has previously recognized, making "eligible voters" the *sine qua non* of apportionment poses similar concerns about exclusion. *See, e.g.*, *Burns*, 384 U.S. at 92-93.

Appellants' proposed scheme for redistricting seeks to count out underserved groups—like persons not yet registered to vote, children, immigrants, and disfranchised persons—and would impose considerable and concrete harms. *Cf. Anderson v. Celebreeze*, 460 U.S. 780, 793 (1983) ("[I]t is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."). As the pre-*Reynolds* era showed, this sort of underrepresentation has real-world consequences, *see supra* at 8-10, since the excluded constituents are less fully and faithfully represented in the legislative process, resulting in policies that are less attentive to local needs and concerns.[5] *See* Choper, *supra*, at 94 (not-

---

[5] Today, urban areas account for 80.7% of the U.S. population. U.S. Census, Growth in Urban Population Outpaces Rest of Nation, Census Bureau Reports (Mar. 26, 2012), *available at* https://www.census.gov/newsroom/releases/archives/2010_census/cb12-50.html.

ing that prior to *Reynolds* urban dwellers' "political influence had been seriously diluted by entrenched minority interests"); David C. Saffell, *Reapportionment and Public Policy: State Legislators' Perspectives*, 9 Poly. Stud. J. 916, 921 (1981) (observing a "large number of single state studies conclude that reapportioned states became more responsive to urban needs" following *Reynolds*).

More problematically still, this derogation of representative equality will fall most heavily on Black residents, immigrants, and other communities that already face historical and contemporary discrimination. In Black communities, for example, there are over 20 million people who are not "eligible voters,"[6] including about 13 million Black children,[7] nearly 5 million non-registered Black voters,[8] 2 million Black non-citizens,[9] and 2 million Black individuals with felony convictions.[10] Under Appellants' "eligible vot-

---

[6] Notably, with the exception of the figure for felony convictions, these figures do not include institutionalized persons, and, thus, are merely a floor.

[7] U.S. Census, Tbl. 29, Population by Sex and Age, for Black Alone or in Combination and White Alone, Not Hispanic (2012), *available at* https://www.census.gov/population/race/data/ppl-bc12.html.

[8] U.S. Census, Tbl. 2, Reported Voting and Registration, by Race, Hispanic Origin, Sex, and Age (Nov. 2014), *available at* https://www.census.gov/hhes/www/socdemo/voting/publications/p20/2014/tables.html.

This number does not account for an additional and nearly 6 million Black persons who did not know or did not identify if they are registered voters. *Id.*

[9] *Id.*

[10] Christopher Uggen et al., *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, 17, Tbl. 4 (July

er" approach, such individuals would be largely "fenced out" in ways this Court has rejected for decades.

That exclusion has tangible consequences that cannot be overlooked. For example, Black children disproportionately live in property and face substantial barriers to education and health services.[11] And black families and adults face seriously diminished life expectancies, health outcomes,[12] and economic prospects.[13] Addressing these serious problems requires access to State and local representatives, which would be diminished under Appellants' proposal to apportion representatives based on "eligible voters." As this Court has warned, population measures that "operate[] to the detriment of the poor, blacks, Mexican-Americans, and American Indians" are allowable only under limited circumstances. *Ely v. Klahr*, 403 U.S. 108, 115 n.7 (1971) (quoting *Burns*, 384 U.S. at 92)).

2012), *available at* http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.

[11] Thirty-nine percent (39%) of Black children under 18 years of age, as compared to 13% of white children, lived in poverty in 2013, more than any other racial/ethnic group. Nat'l Ctrs. for Educ. Statistics, Children Living in Poverty, at 3, *available at* https://nces.ed.gov/programs/coe/pdf/coe_cce.pdf.

[12] *See, e.g.*, Ctrs. for Disease Control and Prevention, *Healthy life expectancies at age 65 highest in Hawaii, lowest in Mississippi* (July 18, 2013), *available at* http://www.cdc.gov/media/releases/2013/p0718-life-expectancy.html.

[13] *See, e.g.*, Alan Huffman, *How White Flight Ravaged the Mississippi Delta*, The Atlantic (Jan. 6, 2010), *available at* http://www.theatlantic.com/business/archive/2015/01/how-white-flight-ruined-the-mississippi-delta/384227.

Appellants' proposed "eligible voter" standard is also suspect because it is primed for political manipulation. There is no clear definition of "eligible voters," and the process of giving that term meaning creates abundant opportunity for gamesmanship, as Appellants' own brief shows. Appellants most often suggest that "eligible voters" be counted using CVAP, Appellants' Br. 18, but alternatively suggest that voter registration numbers might form an alternative benchmark, *id.* at 9. That lack of definition will create opportunities for invidious manipulation. For example, voting-age adults in urban areas register to vote at lower rates than their rural counterparts, *see* Kimball W. Brace, Final Report of the 2004 Election Day Survey 2-12 (2005); those adults who do not register are counted toward an area's CVAP, but obviously are not included in its voter-registration figures. The use of voter-registration numbers therefore would indicate a lower "eligible voter" population than CVAP, providing improper incentives to legislators who might prefer to reduce that area's representation. By contrast, total population is easy to define and can be readily quantified using decennial census figures. *See Karcher v. Daggett*, 462 U.S. 725, 738 (1983) ("[T]he census data provide the only reliable—albeit less than perfect—indication of the districts' 'real' relative population levels.").

For these reasons, this Court warned in *Burns* that apportionment based on registered or actual voter numbers is "susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process or perpetuate a 'ghost of prior malapportion-

ment.'" 384 U.S. at 92-93. But unless this Court is prepared to hold that the Constitution requires the use of CVAP or some similar measure to count "eligible voters," Appellants' conception of "eligible voters" would routinely open the door to such abuses.

Even once legislators choose a standard for "eligible voters," they could further manipulate apportionment through laws that alter the size and composition of the "eligible voter" population. The possibility is well-illustrated by felon disfranchisement laws. State legislatures have latitude to restrict or eliminate the voting rights of people with felony convictions, *see Richardson v. Ramirez*, 418 U.S. 24 (1974), and they do so in numerous ways: Nearly all states prohibit voting by those incarcerated for felony offenses; many deny the vote to individuals on probation or parole; and many states prescribe cumbersome processes for restoration of voting rights to ex-offenders. *See* Developments in the Law, *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv. L. Rev. 1939, 1942-43 (2002); Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 Case W. Res. L. Rev. 727, 767 (1998).

As a result of those laws, over 2.2 million Black Americans are ineligible to vote—fully 7.66% of Black adults. Christopher Uggen et al., *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, 17, Tbl. 4 (July 2012).[14] Such restrictions directly vitiate the voting power of the racial minority groups and the economically disadvantaged groups from which individuals with felony

---

[14] *Available at* http://felonvoting.procon.org/sourcefiles/2010_State_Level_Estimates_of_Felon_Disenfranchisement.pdf.

convictions disproportionately hail. *See, e.g.*, Uggen & Manza, *Democratic Contraction? Political Consequences of Felon Disenfranchisement in the United States*, 67 Am. Soc. Rev. 777 (2002). But under certain "eligible voter" apportionment regimes—ones based on voter registration, for example, *see* Appellants' Br. 9-12—disfranchised individuals with felony convictions would not even be counted as part of a district's population in the first place, further diminishing the representative access and influence of the communities to which they belong.[15]

Voter registration restrictions create similar potential for manipulation. Efforts to make voter registration more difficult by, for example, imposing documentation requirements, such as photo identification or proof of citizenship, are an unfortunate reality of contemporary American democracy. *See Kobach v. Election Assistance Comm'n*, 772 F.3d 1183, 1199 (10th Cir. 2014) (denying States' request to include documentary proof of citizenship language on federal voter registration form); *see also* Jim Bennett, Alabama Secretary of State, *Bennett Says Alabama will Implement Voter Citizenship Requirement* (Dec. 19, 2014) (following the *Kobach* decision, the State declaring its intent to proceed with implemen-

---

[15] In Florida and Kentucky, for instance, which *permanently* bar people with felony convictions from voting, Appellants' framework risks excluding 23% (more than half a million) and 22% (more than 50,000) of the respective Black populations in those States, from the very representation that those individuals need to reintegrate into their communities and access jobs, health services, education, and more following incarceration. Christopher Uggen et al., *State-Level Estimates of Felon Disenfranchisement in the United States, 2010*, 17, Tbl. 4 (July 2012), *available at* http://felonvoting.procon.org/sourcefiles/2010_State_Level_Estimates_of_Felon_Disenfranchisement.pdf.

tation of proof of citizenship for new voters).[16] Such burdens, too, disproportionately affect racial minorities, low-income residents, and other communities that often lack the opportunity or resources to easily comply with heightened registration and voting requirements. *Cf. Veasey v. Abbott*, 796 F.3d 487, 505-07 (5th Cir. 2015) (affirming finding that documentary voting requirements disproportionately affect low-income voters and racial minorities, including more than 600,000 registered voters and one million eligible voters, overwhelmingly Black and Hispanic in Texas). Apportionment schemes based on voter registration, therefore, constitute yet another mechanism by which legislators could reduce the representative access of poor communities and people of color under Appellants' proposal.

This Court has "underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests or which will necessarily tend to favor . . . less populous districts over their more highly populated neighbors." *Abate v. Mundt*, 403 U.S. 182, 185-86 (1971); *see also Gray v. Sanders*, 372 U.S. 368, 379 (1963) (striking down, even before *Reynolds*, a voting scheme that assigned greater electoral power to less densely populated rural areas to the detri-

---

[16] *Available at http://www.sos.alabama.gov/pr/pr.aspx?ID=9330*; *see also* Brennan Center for Justice at NYU School of Law, Citizens Without Proof (2006), *available at* http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf (reporting that 13 million individuals lack ready access to proof of citizenship documents like passports, naturalization papers, or birth certificates and more than 5.5 million (or 25%) of Black voting-age citizens lack current government issued photo ID).

ment of urban areas). Although drawing electoral lines based on voting metrics may, in limited circumstances, be permissible, this Court's repeated warnings make clear that the practice is to be approached with great caution, and is, under no circumstances, constitutionally required. *Abate*, 403 U.S. at 185-86; *Ely*, 403 U.S. at 115 n.7.

B. Appellants' Proposal Does Not Have a Constitutional Value That Justifies Its Deleterious Effect on Representational Equality.

In light of its harmful effects, the use of an "eligible voter" apportionment model that is easy to manipulate would be questionable even if it advanced some identifiable constitutional purpose. But it does not.

Although Appellants assert a right to an "equal vote" that is not "diluted," Appellants' Br. 14, and a right to a vote that "'counts as much . . . as any other person's,'" *id.* at 16 (quoting *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 54 (1970)), they provide no meaningful proposal for measuring "an equally weighted vote," *id.* at 26, much less equal representation. Instead, they proceed entirely on the assumption that "an equally weighted vote" means only one thing—a vote cast in a district with the same number of "eligible voters" as other districts. *See, e.g.*, *id.* at 3, 15. But that circular argument—which Appellants never even attempt to justify—is entirely question-begging and unmoored from this Court's precedents.

Appellants' proposal collapses under even the most cursory of scrutiny. Neither individual voters nor groups of voters benefit in any tangible way from districts with equal numbers of "eligible voters." A

vote's weight in an election turns on a host of variables other than district size, including a district's partisan constituency, competitiveness, and voter turnout. Since many variables are more important to a vote's real-world impact than "eligible voter population," Appellants' idea of an "equal vote" has no obvious real-world or theoretical significance. *See generally* Joseph Fishkin, *Weightless Votes*, 121 Yale L.J. 1888 (2012). It also lacks a *constitutional* significance that might justify the representational harms that Appellants' theory would inflict.

This Court's precedents confirm the point. In *Whitcomb*, this Court rejected a theoretical model of "voting power" that ignored "the quality or effectiveness of representation later furnished by the successful candidates." 403 U.S. at 145; *id.* at 168 (Harlan, J., concurring in part and dissenting in part). This Court held that model irrelevant to one person, one vote analysis because "the position remains a theoretical one and . . . does not take into account any political or other factors which might affect the actual voting power of the residents, which might include party affiliation, race, previous voting characteristics or any other factors which go into the entire political voting situation." *Id.* at 145-46 (opinion of the Court) (quotation and footnote omitted). *See also Morris*, 489 U.S. at 697, 699 (again rejecting a theoretical model of equal "voting power" and explaining equal population, not statistical abstraction, is the relevant touchstone for compliance with one person, one vote).

This case warrants yet more skepticism than *Whitcomb* and *Morris*. Appellants' circular conception of an "equal vote" is even weaker than those previously rejected by this Court, and suffers from

the same glaring weaknesses—*viz.*, it is completely blind to the factors that actually determine a vote's real-world impact. Appellants fail to demonstrate that their set of new standards would benefit any voter anywhere in any way. But their proposal's potential harms to representational access and the dignity of Blacks and other racial minorities are crystal clear. They cannot be justified by such unprecedented and hollow suppositions about the "right to an equal vote." Appellants' Br. 18.

III. THERE IS NO CONFLICT BETWEEN ONE PERSON, ONE VOTE AND SECTION 2 OF THE VOTING RIGHTS ACT.

Although this case plainly does not arise under Section 2 of the VRA—passed only a year after this Court's decision in *Reynolds*—a handful of *amici curiae*[17] insist that this Court must resolve a "bloody crossroads" between that provision and one person, one vote jurisprudence. Cato Juris. Br. 4. CVAP data may be used (as just one of many factors) to prove and devise remedies for Section 2 violations. Accordingly, these *amici* suggest, CVAP data should also govern constitutional challenges under one person, one vote, lest jurisdictions "navigating between the VRA's Scylla and the Constitution's Charybdis . . . wreck individual rights . . . on judicial shoals." *Id.* at 2.

---

[17] *See* Brief of the Cato Institute and Reason Foundation as *Amici Curiae* Supporting Appellants ("Cato Br."); Brief of the Cato Institute and Reason Foundation as *Amici Curiae* Supporting Appellants' Jurisdictional Statement ("Cato Juris. Br."); Brief for Project 21 as *Amicus Curiae* in Support of Appellants ("Project 21 Br."); Brief of the City of Yakima, Washington as *Amicus Curiae* Supporting Appellants ("Yakima Br.").

This is wrong in principle and practice. For one, *amici* would incorrectly have this Court construe a *constitutional* requirement in light of a perceived and later-in-time *statutory* requirement. Moreover, there is a reason why one person, one vote and Section 2 have coexisted for 50 years without any splintered hulls: the two doctrines address fundamentally different concerns. The former governs *how many* people should be in a district to ensure representative equality; the latter addresses *who* should be in each district to ensure collective voting opportunity for particular, protected groups. Those distinct concerns permit, and may often require, different demographic data to be used in different ways: Whereas one person, one vote looks to total population to ensure that districts are equally populous, Section 2 permits the use of CVAP as one of many measures to ensure that a geographically cohesive minority group is given the opportunity to elect candidates of its choice and participate equally in the political process in the presence of racially polarized voting. There is no logical basis to insist that such fundamentally different inquiries rest on identical demographic data.

A. In Principle, There Is No Conflict Between One Person, One Vote and Section 2.

Section 2 of the VRA and the Fourteenth Amendment's equal population guarantee promote political equality through complementary yet distinctive standards. While these standards overlap in their ultimate aim, they embody different rights, are directed to individuals in distinct groups, and play fundamentally different roles in fostering a well-functioning political process. Thus, it is no surprise

that these guarantees may at times focus on different demographic data.

The one person, one vote doctrine is grounded squarely in the Equal Protection Clause. *See Reynolds*, 377 U.S. at 566. Consistent with the Fourteenth Amendment's guarantee of equal protection to all *persons*, *Yick Wo*, 118 U.S. at 356, the equal population principle broadly protects "the fundamental principle of representative government . . . of equal representation for equal numbers of people." *Reynolds*, 377 U.S. at 560-61; *Kirkpatrick*, 394 U.S. at 526 ("Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."); *supra* Part I.

By contrast, the VRA derives from Congress's power to enforce the Fourteenth and Fifteenth Amendments. *South Carolina v. Katzenbach*, 383 U.S. 301, 327 (1966); *see also Voinovich v. Quilter*, 507 U.S. 146, 152 (1993); *Lodge v. Buxton*, 639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982). The Fourteenth Amendment prohibits a voting scheme "'conceived or operated as [a] purposeful device[] to further racial discrimination' by minimizing, cancelling out or diluting the voting strength of racial elements in the voting population." *Rogers*, 458 U.S. at 617. The Fifteenth Amendment ensures that the right to vote "shall not be denied or abridged" "on account of race" or "color." Section 2 thus focuses on a minority group's ability to "elect representatives of their choice" and participate equally in the political process. 52 U.S.C. § 10301(b). Its goal is to maintain fairness and equality of opportunity in the political process by examining the *aggregate* voting power of individuals in

a minority group: Section 2 ensures that when a State exercises its discretion to reapportion or use an electoral scheme, it does not diminish a minority group's "potential to elect" its preferred representatives. *Gingles*, 478 U.S. at 50 n.17 (1986) (emphasis omitted).

To that end, courts adjudicating Section 2 challenges often consider additional measures beyond total population like voting-age population ("VAP") and/or CVAP data at the liability stage to determine whether individuals in a protected minority group are sufficiently large and cohesive that they *could* exercise their *voting* power to elect candidates of their choice.[18] VAP, CVAP, and/or other data also may be relevant at the remedial phase to ensure that the proposed remedy can secure that group's potential to elect its preferred representatives.

Different tasks require different data. One person, one vote aims to ensure representational equality for all persons protected by the Fourteenth Amendment; Section 2 aims to ensure actual electoral opportunity for individuals in a particular minority voting group as an implementation of the Fourteenth and Fifteenth Amendments. Thus, far from being in conflict, Section 2 complements the equal population principle by ensuring State apportionment schemes do not undermine the opportunity

---

[18] Courts can and do choose from a wide variety of population bases in answering the question of whether individuals in a minority population are "sufficiently large" to constitute a majority in a district. *See, e.g.*, *Johnson v. DeGrandy*, 512 U.S. 997, 1008-10 (1994) (expressly declining to decide which measure should be used to establish a population measure); *see also LULAC*, 548 U.S. at 429 (affirming use of CVAP); *Bartlett v. Strickland*, 556 U.S. 1 (2009) (consistently referring to VAP).

of individuals in a protected group to elect candidates of their choice. *See Gaffney*, 412 U.S. at 751 ("A districting plan may create multimember districts perfectly acceptable under equal population standards, but invidiously discriminatory because they are employed 'to minimize or cancel out the voting strength of racial or political elements of the voting population.'" (quoting *Forston v. Dorsey*, 379 U.S. 433, 439 (1965))). Given these fundamental differences, it would be unreasonable to require that these two doctrines be measured against the same standard.

B. In Practice, There Is No Conflict Between One Person, One Vote and Section 2.

Amici contend that if one person, one vote and Section 2 are construed to rely on different population bases, the two standards would inevitably conflict: Districts drawn with CVAP data to comply with Section 2 would violate one person, one vote and *vice versa*. *See, e.g.*, Cato Br. 33-35. This argument misunderstands how the two standards operate in practice. In reality, there is no such conflict.

Under *Gingles*, plaintiffs (members of a minority group) must make a three-part, threshold showing in proving a Section 2 vote-dilution claim: (1) they must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) they must be "politically cohesive" ; and (3) the majority must vote "sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." 478 U.S. at 50-51. Although this Court has never expressly required the use of any particular set of data to determine if the first *Gingles* factor is satisfied,

some courts of appeals have determined CVAP is the appropriate population base when considering the size and cohesion of voting blocs in a Section 2 analysis.[19]

But while CVAP (or some other) data can satisfy that factor, that is not enough to establish a Section 2 violation. "[W]hen a party has established the *Gingles* requirements . . . a court proceed[s] to analyze whether a violation has occurred based on the totality of the circumstances." *Bartlett v. Strickland*, 556 U.S. 1, 11-12 (2009). These circumstances can include the extent to which voting is racially polarized, proportionality between the number of districts in which members of the protected group form an effective majority and the group's share of the population in the relevant area, the state's history of voting-related discrimination, and the extent to which members of the minority group are elected to political office in the challenged jurisdiction. *See, e.g.*, *LULAC*, 548 U.S. at 426; *Bartlett*, 556 U.S. at 29. Thus, CVAP and other data are small pieces of a much larger evidentiary puzzle in the Section 2 context. *See Johnson v. DeGrandy*, 512 U.S. 997, 1020-21 (1994) ("No single statistic provides courts with a shortcut to determine whether" a state districting scheme "unlawfully dilutes minority voting strength.").

Nor does CVAP, or some other data dictate any particular remedy. States and local jurisdictions, which generally are afforded the first opportunity to

---

[19] *See, e.g.*, *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 853 (5th Cir. 1999) (considering VAP and CVAP); *Barnett v. City of Chi.*, 141 F.3d 699, 704-05 (7th Cir. 1998) (using CVAP).

exercise their political judgment as to how to remedy Section 2 violations, *White v. Weiser*, 412 U.S. 783, 794-96 (1973), "retain broad discretion in drawing districts to comply with the mandate of § 2." *Shaw*, 517 U.S. at 917 n.9. Because "reapportionment is primarily the duty and responsibility of the State," *Chapman v. Meier*, 420 U.S. 1, 27 (1975), Section 2 remedies may properly account for legitimate State policies, provided that the remedy ultimately ensures that members of a minority group have the potential to elect their preferred candidates. *See Voinovich*, 507 U.S. at 156; *accord Fairley v. Hattiesburg, Miss.*, 584 F.3d 660, 670 (5th Cir. 2009) ("Courts are expected, in evaluating redistrict plans, to take into account traditional districting principles such as maintaining communities of interest and traditional boundaries." (quotation and citation omitted)). Consequently, CVAP (or some other) data need not be the driving force behind remedial redistricting[20]; indeed, a State might constitutionally employ an electoral scheme that eschews districts altogether.[21] And even if CVAP data is used, there al-

---

[20] The dispute in *Garza*, for instance, arose from the use of total population data to remedy a Section 2 violation. *Garza v. Cty. of L.A.*, 918 F.2d 763, 773-75 (9th Cir. 1990); *see also Fabela v. City of Farmers Branch, Tex.*, No. 10-1425, 2012 WL 3135545, at *6 n.13 (N.D. Tex. Aug. 2, 2012) ("Regarding defendants' one-person, one-vote challenge, among the options available to Farmers Branch to remedy a § 2 violation is to draw single-member districts based on total population.").

[21] Because "geographic districting is not a requirement inherent in our political system," *Holder v. Hall*, 512 U.S. 874, 911 (1994) (Thomas, J., concurring); *id.* at 910 n. 17 (observing that "cumulative voting in an at-large system has been employed in some American jurisdictions"), there is nothing that would prevent a State from adopting, for example, a system of cumulative or limited voting to remedy a Section 2 violation.

ways remains "more than one way to draw a district." *Chen v. City of Houston*, 206 F.3d 502, 519 (5th Cir. 2000).[22]

States' considerable "flexibility" in implementing one person, one vote, *Reynolds*, 377 U.S. at 579, provides ample constitutional latitude to craft Section 2 remedies. The Equal Protection Clause does not mandate rigid population equality for state reapportionment; rather, deviations of up to 10% are constitutionally permissible, as States are afforded significant leeway to accommodate other legitimate government interests. *See Brown v. Thomson*, 462 U.S. 835, 852 (1983). Even deviations above 10% may be constitutional if not significantly greater than neces-

---

See Branch v. Smith, 538 U.S. 254, 310 (2003) (O'Connor, J., concurring in part and dissenting in part) ("a court could design an at-large election plan that awards seats on a cumulative basis, or by some other method that would result in a plan that satisfies the Voting Rights Act"); *see also* Yakima Br. 25.

[22] *Dillard v. Town of Louisville*, 730 F. Supp. 1546 (M.D. Ala. 1990), illustrates perfectly how Section 2's remedial flexibility operates to avoid any potential conflict with the Fourteenth Amendment. There, the town of Louisville, Alabama proposed a remedial plan containing two non-contiguous majority-minority districts because current population distribution meant that no single-member districting scheme could be devised that remedied the Section 2 violation, complied with one person, one vote, and consisted only of contiguous districts. *Id.* at 1549. Observing that courts "should be flexible and should not seek to apply rigid, abstract formulas divorced from reality," the *Dillard* court held that, based on the totality of circumstances, the plan fulfilled the town's obligations under Section 2 and the Equal Protection Clause while meeting the town's "practical needs" and accommodating "a sense of community within each district." *Id.* at 1549-50; *see also Dillard v. Chilton Cty. Bd. of Educ.*, 699 F. Supp. 870, 876 (M.D. Ala. 1988), *aff'd*, 868 F.2d 1274 (11th Cir. 1989).

sary to serve legitimate State concerns. *Id.*; *Abate*, 403 U.S at 185. This mutually reinforcing flexibility means that States do not have to thread the needle to comply with Section 2 and one person, one vote.

Indeed, an actual conflict is exceedingly farfetched—if not impossible. The numerous briefs filed by *amici* advancing this argument have failed to cite a single case, in more than 50 years since the passage of the VRA, where a remedial plan conflicted with the equal population requirement. And there does not appear to be a single example of such a conflict under the Constitution's less flexible requirements for congressional apportionment, which require near-absolute fidelity to population equality, *Kirkpatrick*, 394 U.S. at 530-31. What *amici* curiously refer to as a "bloody crossroads," *see* Cato Juris. Br. 4, in fact presents no real conflict at all.

Moreover, even if this imaginary contingency somehow became real, the solution to *amici*'s hypothetical "conflict" would be simple: There would be no conflict because Section 2 does not authorize a state to violate the Fourteenth Amendment. In other words, a constitutional remedy is a necessary part of a Section 2 claim. *See Holder v. Hall*, 512 U.S. 874, 880 (1994) ("In a § 2 vote dilution suit, along with determining whether the *Gingles* preconditions are met and whether the totality of the circumstances supports a finding of liability, a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice." (footnote omitted)); *Nipper v. Smith*, 39 F.3d 1494, 1533 (11th Cir. 1994) (en banc) ("The absence of an available remedy is not only relevant at the remedial stage of the litigation, but also precludes, under the totality of the circumstances inquiry, a

finding of liability."); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1399 (E.D. Wash. 2014) ("[I]f the plaintiff proves by a preponderance of the evidence that a workable remedy can be fashioned, the first *Gingles* precondition is satisfied."). Because a plaintiff could not state a viable Section 2 claim where the only remedy would require violating the Equal Protection Clause, there could be no conflict.[23]

CONCLUSION

What this Court said in *Reynolds* remains true: "as a basic constitutional standard, the Equal Protection Clause requires that the seats must be apportioned on a population basis." 377 U.S. at 568. The "fundamental principle of representative government is one of equal representation for equal numbers of people." *Id.* at 560-61.

Appellants' sweeping new theory, centered on the indeterminate concept of "eligible voters," risks "fencing out" Black people and other communities of color from this country's representative institutions. The ultimate, disastrous result would be two classes of people: those who count for purposes of representation and redistricting, and those who do not. This Court should reject Appellants' theory and reaffirm the principle enshrined in 50 years of practice and

---

[23] *Amicus* Project 21 suggests that inconsistent standards under Section 2 and one person, one vote might foster Equal Protection violations by affording additional opportunities to engage in "race-conscious decision-making in drawing majority-minority districts." Project 21 Br. 17. But as *amicus* apparently acknowledges, this Court has already set sharp limits on the use of race in remedial redistricting. *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

precedent—that representative government serves all persons within our nation's boundaries equally.

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

SHERRILYN IFILL
Director-Counsel
JANAI NELSON
CHRISTINA SWARNS
LEAH ADEN
LILIANA ZARAGOZA
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006

COTY MONTAG
JOHN PAUL SCHNAPPER-CASTERAS
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
1444 I Street NW,
Washington, DC 20005

WALTER DELLINGER
(*Counsel of Record*)
wdellinger@omm.com
BRADLEY N. GARCIA
JASON ZARROW
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

DANIELLE C. GRAY
O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, N.Y. 10036
(212) 326-2000

Counsel for Amicus Curiae

September 25, 2015

No. 14-940

Supreme Court, U.S.
FILED
SEP 25 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE STATES OF NEW YORK, ALASKA, CALIFORNIA, DELAWARE, HAWAI'I, ILLINOIS, INDIANA, IOWA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEW HAMPSHIRE, NORTH DAKOTA, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
JUDITH N. VALE
Assistant Solicitor General
120 Broadway
New York, NY 10271
(212) 416-8020
barbara.underwood@ag.ny.gov
**Counsel of Record*

(Additional Counsel Listed on Signature Page)

QUESTION PRESENTED

Whether the Equal Protection Clause allows States to use total population, and does not require States to use voter population, when apportioning state legislative districts.

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

STATEMENT 1

A. The States' Convergence on Using Total Population for State Legislative Redistricting 1

B. The States' Forty-Year Partnership with the Census Bureau to Obtain Accurate Redistricting Data 5

C. The States' Use of Census Data to Draw State Legislative Districts 8

SUMMARY OF ARGUMENT 10

ARGUMENT 11

I. Requiring States to Equalize Districts Based on "Eligible Voter" Population Would Disrupt Their Long Reliance on Well-Settled Redistricting Practices 11

A. States Rely on the Census's Enumeration of Total Population to Obtain Accurate, Reliable, and Nonpartisan Population Counts for Redistricting. 11

B. States Lack Any Reliable, Administrable Method to Equalize Districts Based on "Eligible Voter" Population 14

II. The States' Use of a Total-Population Base Is Consistent with a Policy of Providing Fair and Effective Representation to Voters and Nonvoters Alike. 26

CONCLUSION 39

TABLE OF AUTHORITIES

Cases **Page(s)**

Bartlett v. Strickland, 556 U.S. 1 (2009) 16

Benavidez v. City of Irving, 638 F. Supp. 2d 709 (N.D. Tex. 2009) 21

Board of Estimate v. Morris, 489 U.S. 688 (1984) 29,33,35

Brown v. Thompson, 462 U.S. 835 (1983)..... 14,16

Burns v. Richardson, 384 U.S. 73 (1966)..... passim

Calderon v. City of Los Angeles, 4 Cal. 3d 251 (1971) 28,37

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000) 14

Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996) 14,28

Davis v. Bandemer, 478 U.S. 109 (1986) 28

Department of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999)..... 20

Federation for American Immigration Reform v. Klutznick, 486 F. Supp. 564 (D.D.C. 1980) 17

Gaffney v. Cummings, 412 U.S. 735 (1973)..... 14

Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990) 14,28

Gray v. Sanders, 372 U.S. 368 (1963)..... 34

Hadley v. Junior College District, 397 U.S. 50 (1970) 33

Hippert v. Ritchie, 813 N.W.2d 374 (Minn. 2012) 14

Karcher v. Daggett, 462 U.S. 725 (1983)..... 14

Kirkpatrick v. Preisler, 394 U.S. 526 (1969)..... 14,28

Klahr v. Goddard, 250 F. Supp. 537 (D. Ariz. 1966) ... 5

Kostick v. Nago, 960 F. Supp. 2d 1074 (D. Haw. 2013) 5

Pickett v. Brown, 462 U.S. 1 (1983) 38

Plyler v. Doe, 457 U.S. 202 (1982) 38

Reyes v. City of Farmers Branch, No. 07-cv-900, 2008 WL 4791498 (N.D. Tex. Nov. 4, 2008) 21

Reynolds v. Sims, 377 U.S. 533 (1964) 2,26,27,33

Sanchez v. Colorado, 97 F.3d 1303 (10th Cir. 1996) 21

Silver v. Jordan, 241 F. Supp. 576 (S.D. Cal. 1964) 31

State ex rel. Lockart v. Crowell, 631 S.W.2d 702 (Tenn. 1982) 4

Thornburg v. Gingles, 478 U.S. 30 (1986) 21

Travis v. King, 552 F. Supp. 554 (D. Haw. 1982) 5

Vieth v. Jubelirer, 541 U.S. 267 (2004) 16

Wesberry v. Sanders, 376 U.S.1 (1964) 26,33,34

Wisconsin v. City of New York, 517 U.S. 1 (1996) 12

Constitutional Provisions

U.S. Const.
article I, § 2 2,34
amend. XIV 2,7,16

Ala. Const. article IX, §§ 198-200 8

Cal. Const. of 1879, art. IV, § 6 37

Conn. Const. art. III, § 6 8

Haw. Const.
art. IV, § 4 9
art. IV, § 6 9,37

Ill. Const. of 1870 art. IV, §§ 6-8 2

Kan. Const. art. X, § 1 9

Me. Const.
art. IV, pt. 1, § 2 9
art. IV, pt. 2, § 2 9
Mass. Const. art. CXVII 4
Mich. Const. of 1909, art. 5, § 4 2
Mo. Const. of 1875, art. IV, § 7 2
Neb. Const. art. III, § 5 9
N.H. Const. pt. 2d, art. 9-a 9
N.Y. Const.
art. III, § 4. 3
art. III, § 5-a 3
N.Y. Const. of 1821, art. I, §§ 6-7 3
N.Y. Const. of 1846, art. III, §§ 4-5 3
Tenn. Const. of 1870 art. II, §§ 4-6 4

Laws

Pub. L. No. 94-171, 89 Stat. 1023 (1975) 6
13 U.S.C. § 141 6
Cal. Elec. Code § 21003 9
Del. Code Title 29, § 804A 9
Md. Code, State Gov't Law § 2-2A-01 9
N.Y.
Corr. Law § 71 9
Legis. Law § 83-m 9

Miscellaneous Authorities

Alaska Redistricting Bd., 2013 Proclamation District Population Analysis (2013) 25
Ansolabehere, Stephen, & James M. Snyder Jr., *The End of Inequality, One person, One Vote and the Transformation of American Politics* (2008) 30

Arizona Sec'y of State, Referendum and Initiative Publicity Pamphlet (1972), http://azmemory.azlibrary.gov/cdm/ref/collection/statepubs/id/10531 5

Baker v. Carr, Brief for Appellants, 369 U.S. 186 (1962), 1961 WL 64817 30

California Sec'y of State, California Ballot Pamphlet –Primary Election, June 3, 1980 (1980), http://repository.uchastings.edu/ca_ballot_props/885/ 37

Congressional Globe, 39th Cong., 1st Sess. 2767 (1866) 34

Conley, Patrick T., Jr., *One Town, Two Voters; One Man, One Vote: A History of Legislative Apportionment in Rhode Island*, R.I. Bar J. 18 (May 1986) 31

Demos, *What Is Same Day Registration? Where Is It Available?* (2014), http://www.demos.org/publication/what-same-day-registration-where-it-available 23

Enumeration of Undocumented Aliens in the Decennial Census: Hearing Before the Subcomm. on Energy, Nuclear Proliferation, & Gov't Processes of the Comm. on Gov'tal Affairs, 99th Cong. (1985) 7

Hanna, David R., Texas Legislative Council, Using Citizenship Data for Redistricting (n.d.), http://www.ncsl.org/documents/redistricting/ HannaNCSLMar27final.pdf 19

Hawai'i 1991 Reapportionment Comm'n, *Final Report and Reapportionment Plan* (1992) 9,37

Lewis, Anthony, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057 (1958) 29

Massachusetts Legis. Research Council, *Report Relative to Changing the Size of the House of Representatives & the Census Basis of Legislative Redistricting*, H. Doc. No. 7020 (1973), http://www.nesl.edu/research/Legislative_Council/Census_basis_1973.pdf 3,4

Massachusetts Sec'y of the Commw., *Information for Voters: The Ballot Questions in 1990* (1990), http://archives.lib.state.ma.us/bitstream/handle/2452/264518/ocm18711581-1990.pdf 4

McCully, Catherine, U.S. Bureau of the Census, *Designing P.L. 94-171 Redistricting Data for the Year 2020 Census, The View from the States* (2014), http://www.census.gov/library/publications/2014/rdo/pl94-171.html 6,8

National Conference of State Legislatures, *Redistricting Law 2010* (2009) 7,8,14

National Conference of State Legislatures, *Same Day Voter Registration* (June 2, 2015), http://www.ncsl.org/research/elections-and-campaigns/same-dayregistration.aspx 23

National Mun. League, *Compendium on Legislative Apportionment* (2d ed. 1962), http://catalog.hathitrust.org/Record/001156487 31

New York Citizens' Comm. on Reapportionment, *Report to Governor Nelson A. Rockefeller* (1964), http://128.121.13.244/awweb/main.jsp?flag=browse&smd=1&awdid=76 2,24

New York Const. Convention, *Revised Record of the Constitutional Convention of the State of New York*, May 8, 1984 to September 29, 1894, vol. 3 (1900) 3

New York Legis. Task Force on Demographic Research & Reapportionment, Senate's Dep't of Justice Submission (2012), http://latfor.state.ny.us/justice2012/?sec=sendoj2012 25

New York Senate Standing Comm. on Crime Victims, Crime & Correction, *2009-2010 Report* (2010), http://www.nysenate.gov/files/pdfs/CrimeCommitteeReport.pdf 9

North Dakota Sec'y of State, North Dakota....The Only State Without Voter Registration (July 2015), https://vip.sos.nd.gov/pdfs/Portals/votereg.pdf 22

Persily, Nathaniel, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755 (2011) 18,19

Savage, David G. & David Lauter, *Supreme Court Redistricting Case Could Reduce Latinos' Political Clout*, L.A. Times, May 26, 2015, http://www.latimes.com/nation/la-na-supreme-court-voting-districts-20150526-story.html 26

Senate Rep. No. 94-539 (1975) 6

Silva, Ruth C., *The Population Base for Apportionment of the N.Y. Legislature*, 32 Fordham L. Rev. 1 (1963) 2,3

Smith, J. Douglas, *On Democracy's Doorstep* (2014) 29,30,32

Strout, Richard L., *The Next Election Is Already Rigged*, Harper's Magazine 35 (Nov. 1959)..... 30

Tabulation of Population for Purposes of Apportionment of State Legislative Bodies, Hearings Before the Subcomm. on Census & Statistics of the Comm. on Post Office & Civil Service, 93rd Cong. (1973) 6

Tennessee Bureau of Public Admin., Univ. of Tenn., Memorandum on Legislative Apportionment in Tennessee (1961)..... 30

U.S. Advisory Comm'n on Intergovernmental Relations, *A Report to the President for Transmittal to the Congress* (1955), http://babel.hathitrust.org/cgi/pt?id=umn.31951p00820094c;view=1up;seq=1 32

U.S. Advisory Comm'n on Intergovernmental Relations, *Apportionment of State Legislatures* (1962), http://babel.hathitrust.org/cgi/pt?id=umn.31951p00820094c;view=1up;seq=1..... 30

U.S. Bureau of the Census, *2010 Census by the Numbers* (Mar. 2010), https://www.census.gov/newsroom/releases/pdf/cb10-ffse01.pdf..... 13

U.S. Bureau of the Census, *2010 Census Memorandum Planning Series No. 239, 2010 Census Content and Forms Design Program Assessment Report* (Sept. 25, 2012), https://www.census.gov/2010census/pdf/2010_Census_CFD_Program_Assessment.pdf 7

U.S. Bureau of the Census, *2010 Census Redistricting Data (Public Law 94-171) Summary File* (2011), http://www.census.gov/prod/cen2010/doc/pl94-171.pdf..... 2

U.S. Bureau of the Census, *A Compass for Understanding & Using American Community Survey Data: What General Data Users Need to Know* (2008), https://www.census.gov/content/dam/Census/library/publications/2008/acs/ACSGeneralHandbook.pdf 18,19

U.S. Bureau of the Census, *About the Census* (Sept. 2015), http://www.census.gov/programs-surveys/decennial-census/2020-census/about.html 24

U.S. Bureau of the Census, et al., Statement of Commitment to Scientific Integrity by Principal Statistical Agencies (n.d.), http://www.census.gov/about/policies/quality/scientific_integrity.html 13

Wattson, Peter S., Nat'l Conf. of State Legislatures, *How to Draw Redistricting Plans That Will Stand Up in Court* 9-10 (2011), http://www.ncsl.org/documents/legismgt/How_To_Draw_Maps.pdf 6,14

White, Robert H., *Legislative Apportionment in Tennessee* (1962) 4

INTEREST OF *AMICI CURIAE*

Like Texas and every other State, *Amici* States draw state legislative districts that contain approximately equal numbers of residents, based largely on data provided by the U.S. Bureau of the Census's decennial enumeration of total population. States have relied on this total-population model for decades, and have entered into a unique collaboration with the Census Bureau to enhance the accuracy and usefulness of the Census's total-population data for state redistricting.

Appellants seek to upend the States' well-established redistricting practices by asking this Court to declare the States' uniform reliance on total population to be a violation of the Equal Protection Clause. If appellants were to prevail, the States would be forced to abandon a redistricting practice proven through experience to be fair, effective, and administrable. *Amici* States have a strong interest both in preserving their practice of equalizing total population across legislative districts, and in defending the principles of representational government that support this practice.

STATEMENT

A. The States' Convergence on Using Total Population for State Legislative Redistricting

Today, every State uses total population as the starting point for drawing equally populated state legislative districts. See App., Constitutional and Statutory Provisions on Using Total Population for Redistricting. Moreover, to obtain accurate data

about total population, every State works closely with the Census Bureau in a unique and long-running collaboration that provides States with detailed, block-by-block population data based on the Census's decennial "actual Enumeration" of "the whole number of persons in each State," U.S. Const. art. I, § 2, cl. 3; amend. XIV, § 2.[1]

Most States (including Illinois, Michigan, and Missouri) have used the Census's total-population count in redistricting for more than a century.[2] However, in the past, some States have drawn legislative districts based on voter registration, citizenship, or another metric.[3] Because the federal Census does not enumerate voters or citizens, these States were required to conduct their own counts of such populations. But as several States discovered, that process proved expensive, unreliable, and vulnerable to partisan manipulation.

For example, from 1821 to 1969, New York redistricted based largely on its own count of U.S. citizens—thus excluding some nonvoters, such as aliens, but including others, such as children.[4] New

---

[1] U.S. Bureau of the Census, *2010 Census Redistricting Data (Public Law 94-171) Summary File* A-23, A-26 (2011).

[2] Ill. Const. of 1870, art. IV, §§ 6-8; Mo. Const. of 1875, art. IV, § 7; Mich. Const. of 1909, art. 5, § 4. Prior to *Reynolds v. Sims*, 377 U.S. 533 (1964), some of these States also redistricted based on geographic subdivisions.

[3] N.Y. Citizens' Comm. on Reapportionment, *Report to Governor Nelson A. Rockefeller* ("*N.Y. Report*") 85-91 (1964) (state-by-state compilation).

[4] Ruth C. Silva, *The Population Base for Apportionment of the N.Y. Legislature*, 32 Fordham L. Rev. 1, 6-19 (1963). From 1821 to 1894, New York also excluded poor persons or "persons

(*continues on next page*)

York first conducted its own census to gather citizen counts, but insufficient funding and a lack of well-trained enumerator staff caused "countless errors" in the results.[5] Legislators alleged that partisan manipulation also infected the state-run census because some districts received inflated or depressed citizen counts, which increased or decreased their political power.[6] New York attempted to address these problems by contracting with the federal government to count citizens, but these figures were likewise criticized for being "riddled with inaccuracy" and too costly to obtain.[7] Because of these difficulties, New York amended its constitution in 1969 to redistrict based on the Census's total-population count. N.Y. Const. art. III, § 5-a; *see id.* § 4(a).

Massachusetts experienced similar difficulties. From 1857 to 1970, Massachusetts redistricted based on its own count of potential voters, and from 1970 to 1990 based on its own "census of the inhabitants."[8] Massachusetts relied on each municipality to conduct its own count of voters or inhabitants. But this process resulted in "very uneven" data due to municipal employees' lack of training, ambiguities in

---

of color not taxed" from its redistricting base. N.Y. Const. of 1821, art. I, §§ 6-7; N.Y. Const. of 1846, art. III, §§ 4-5.

[5] Silva, *supra*, at 11.

[6] *See* 3 N.Y. Const. Convention, *Revised Record of the Constitutional Convention of the State of New York*, May 8, 1984 to September 29, 1894, 1112-13, 1138-40 (1900).

[7] Silva, *supra*, at 13, 15; *see id.* at 12-16.

[8] Mass. Legis. Research Council, *Report Relative to Changing the Size of the House of Representatives & the Census Basis of Legislative Redistricting*, H. Doc. No. 7020, at 316-17 (1973).

state guidelines, and insufficient resources.[9] This decentralized process also created political "conflict[s] of interest" because of the "great temptation" for municipalities "to inflate their counts" for political power.[10] In response to these problems, Massachusetts abolished its state census in 1990 and adopted the Census's enumeration for redistricting.[11]

Tennessee also faced such problems when it redistricted based on "qualified voters" prior to 1966.[12] Tennessee first conducted its own enumeration of voting-age males, but decided in 1901 to rely instead on the federal Census to "'save the expense of an actual enumeration.'"[13] Legislators claimed to have extrapolated the number of "qualified voters" from the Census's total-population count, but the results triggered partisan division as legislators alleged that the redistricting committee "'had no figures showing the qualified voters'" on which to base redistricting.[14] After experiencing these difficulties, Tennessee in 1966 eliminated its constitutional requirement to redistrict based on "qualified voters" and instead used the Census's total-population count.[15]

---

[9] *Id.* at 342-43.

[10] *Id.* at 343.

[11] *See* Mass. Const. art. CXVII; Mass. Sec'y of the Commw., *Information for Voters: The Ballot Questions in 1990*, at 2 (1990).

[12] Tenn. Const. of 1870 art. II, §§ 4-6.

[13] Robert H. White, *Legislative Apportionment in Tennessee* 28 (1962) (quoting joint resolution).

[14] *Id.* at 31-32 (quoting protest).

[15] Tenn. Const. of 1870 art. II, §§ 4-6; *see State ex rel. Lockart v. Crowell*, 631 S.W.2d 702, 704-05 (Tenn. 1982).

Other States moved towards using the federal Census's total-population count after court rulings expressed doubt as to the constitutionality of other metrics. For example, although this Court had approved an interim redistricting plan in Hawai'i that equalized the population of registered voters because it "substantially approximated" the results of equalizing total population or state citizen population, *Burns v. Richardson*, 384 U.S. 73, 96 (1966), Hawai'i stopped using a registered-voter metric after a federal court determined that its redistricting plan no longer approximated the result of using a permissible population base. *See Travis v. King*, 552 F. Supp. 554, 564-66 (D. Haw. 1982); *see also Kostick v. Nago*, 960 F. Supp. 2d 1074, 1083-84 (D. Haw. 2013), *aff'd*, 134 S. Ct. 1001 (2014) (upholding use of permanent resident population base). Likewise, Arizona stopped drawing its state senate districts based on the number of ballots cast in the previous gubernatorial election after a federal court disapproved of this metric.[16] *See Klahr v. Goddard*, 250 F. Supp. 537, 547 (D. Ariz. 1966).

B. The States' Forty-Year Partnership with the Census Bureau to Obtain Accurate Redistricting Data

The States' reliance on the Census for state legislative redistricting was formalized by Congress in 1975 through a statute that established a process for providing the States with accurate total-population data in a form readily adaptable to their

---

[16] *See* Ariz. Sec'y of State, Referendum and Initiative Publicity Pamphlet 31-32 (1972).

redistricting needs.[17] *See* Pub. L. No. 94-171, 89 Stat. 1023 (1975) (codified at 13 U.S.C. § 141(c)). Before P.L. 94-171, the States had difficulty translating Census data for redistricting purposes because the boundaries used by the Census did not always match the boundaries of political subdivisions considered by States in redistricting.[18] P.L. 94-171 resolved this problem and ensured the accuracy, usefulness, and timeliness of federal Census figures by requiring the Census to provide population data to the States broken down by the geographical boundaries that the States intend to use for redistricting.[19] *See* 13 U.S.C. § 141(c).

The P.L. 94-171 process begins "years before the [decennial] census" for most States as they prepare and submit plans describing the areas for which they will request total-population data.[20] States provide the Census with political subdivision boundaries, and suggest boundaries for smaller geographic units (known as census blocks) that are the basic units that States use in adjusting district lines.[21] Within a

---

[17] *Tabulation of Population for Purposes of Apportionment of State Legislative Bodies, Hearings Before the Subcomm. on Census & Statistics of the Comm. on Post Office & Civil Service*, 93rd Cong. 8-9 (1973) ("*Tabulation Hearing*") (statement of Rep. Harold Runnels noting lack of "readily adaptable" data).

[18] S. Rep. No. 94-539, at 2-3 (1975).

[19] *See id.* at 1-3; *Tabulation Hearing*, *supra*, at 5-6 (statement of Rep. Harold Runnels).

[20] Peter S. Wattson, Nat'l Conf. of State Legislatures, *How to Draw Redistricting Plans That Will Stand Up in Court* 9-10 (2011).

[21] *See* Catherine McCully, U.S. Bureau of the Census, *Designing P.L. 94-171 Redistricting Data for the Year 2020*

(continues on next page)

year after the decennial Census, the Bureau provides each State with total-population counts broken down by census blocks, larger units that combine census blocks (such as block groups and census tracts), and the State's requested political subdivisions.[22]

This population data include block-by-block counts of total population, as well as population by race, Hispanic origin, and voting age.[23] It does not include any counts of voters or citizens of voting age because the Census does not enumerate these populations—indeed, the Bureau declined to add a citizenship question to the questionnaire for the most recent Census in 2010.[24] As the Bureau has explained, the decennial Census does not seek information regarding citizenship or voting status because such questions would likely lower response rates (particularly from households with undocumented immigrants who may be unwilling to disclose their status) and thus reduce the accuracy of the constitutionally mandated count of "the whole number of persons in each State" that is required for congressional apportionment.[25] U.S. Const. amend. XIV, § 2.

Census, The View from the States ("*States View*") 7-9 (2014); Wattson, *supra*, at 9-10.

[22] Nat'l Conference of State Legislatures, *Redistricting Law 2010* ("*NCSL Redistricting*"), at 17 (2009).

[23] *See id.*

[24] *See* U.S. Bureau of the Census, *2010 Census Memorandum Planning Series No. 239, 2010 Census Content and Forms Design Program Assessment Report* 14 (Sept. 25, 2012).

[25] *See Enumeration of Undocumented Aliens in the Decennial Census: Hearing Before the Subcomm. on Energy, Nuclear Proliferation, & Gov't Processes of the Comm. on Gov'tal Affairs,*

(continues on next page)

C. The States' Use of Census Data to Draw State Legislative Districts

Release of the Census's data under P.L. 94-171 triggers key redistricting deadlines in many States.[26] By using the total-population data and geographical files provided by the Census, States can combine or separate census blocks and other geographical units as necessary to find an acceptable district map that satisfies a multitude of constitutional, statutory, and other policy requirements.[27] Among other rules, States must equalize the population between districts; prevent racial discrimination; and pursue individual state priorities, such as preserving existing municipal boundaries and drawing compact districts.[28]

As Texas notes (Br. for Appellees 28 n.8), a few States make adjustments to the Census's total-population figures to implement political "choices about the nature of representation." *Burns*, 384 U.S. at 92. For example, two States—Hawai'i and Kansas—adjust their Census counts to exclude certain nonpermanent residents who identify with an out-of-state jurisdiction, including military personnel or students who temporarily reside in the State (and thus are counted there by the Census) but who

---

99th Cong. 15-16, 22-24 (1985) (testimony and statement of John Keane, Director, Bureau of the Census).

[26] *See, e.g.*, Ala. Const. art. IX, §§ 198-200; Conn. Const. art. III, § 6.

[27] *See States View*, *supra*, at 8.

[28] *NCSL Redistricting*, *supra*, at 30-38, 52-77, 105-114.

maintain permanent homes elsewhere.[29] And four States—New York, California, Delaware, and Maryland—adjust the Census's total-population figures by reassigning incarcerated individuals from the prisons where they reside involuntarily (and are counted by the Census) to their home communities.[30] None of these adjustments, however, rests on distinctions between voters and nonvoters. Instead, they permissibly ensure that the total population included in any legislative district accurately and fairly reflects the real interests of the individuals who are part of that district's permanent community.[31]

---

[29] Haw. Const. art. IV, §§ 4, 6; Kan. Const. art. X, § 1. New Hampshire's constitution authorizes its legislature to enact a statute to deduct nonpermanent residents from the Census's total-population count, N.H. Const. pt. 2d, art. 9-a, but no such statute currently exists. The constitutions of Maine and Nebraska similarly authorize deductions of noncitizens from total population if the federal Census provides those figures. Me. Const. art. IV, pt. 1, § 2, pt. 2, § 2; Neb. Const. art. III, § 5. Because the Census does not provide any counts of noncitizens, these States as a matter of practice redistrict based on the Census's enumeration of total population.

[30] N.Y. Legis. Law § 83-m(13); N.Y. Corr. Law § 71(8); Cal. Elec. Code § 21003 (requesting that independent redistricting commission adjust Census figures to deem incarcerated persons as residing at last known residence); Del. Code Tit. 29, § 804A; Md. Code, State Gov't Law § 2-2A-01. These States exclude from the population base incarcerated individuals whose home communities are outside of the State.

[31] *See* Hawai'i 1991 Reapportionment Comm'n, *Final Report and Reapportionment Plan* ("*Hawai'i Repor.*") 21-23 (1992); N.Y. Senate Standing Comm. on Crime Victims, Crime & Correction, *2009-2010 Report* 50-53 (2010).

SUMMARY OF ARGUMENT

Through experience and a close collaboration with the Census Bureau, the States have converged on their now uniform practice of equalizing the number of residents in legislative districts based primarily on the Census's total-population enumeration. Relying on the Census ensures that States have accurate, useful, and neutral total-population counts on which to base redistricting. And using the Census's tabulation of total population has provided a stable and workable standard for measuring district population that States, courts, and experts have long applied with success.

Appellants' theory that States must equalize "eligible voter" population rather than total population, if accepted by this Court, would upend state redistricting practices that have proven through experience to be fair, effective, and administrable. Rather than continuing their long reliance on Census data, States would be required to attempt redistricting based on a vague "eligible voter" metric for which they lack detailed and accurate population counts. And appellants' theory would further upend States' principled choice to redistrict based largely on total population, which helps to ensure equally fair and effective representation in state government for all residents. As this Court explained in *Burns*, such policy judgments about the nature of representation in state government should be respected.

ARGUMENT

I. Requiring States to Equalize Districts Based on "Eligible Voter" Population Would Disrupt Their Long Reliance on Well-Settled Redistricting Practices.

Appellants' argument that the States must give controlling weight to equalizing "eligible voter" population would fundamentally upend the States' redistricting practices. If this Court were to adopt appellants' constitutional theory, the States would be forced to abandon their choice to use total population in favor of an "eligible voter" metric that no existing source of data reliably provides. Moreover, because the Census does not and likely will not enumerate "eligible voters," the States would not be able to rely on the Census for this population metric, depriving them of the substantial benefits of a forty-year partnership that has provided States with detailed and reliable population data tailored to their redistricting needs. The States have a strong interest in avoiding the disruption to their settled redistricting practices that adoption of appellants' position would entail.

A. States Rely on the Census's Enumeration of Total Population to Obtain Accurate, Reliable, and Nonpartisan Population Counts for Redistricting.

Counting the population of any State is an enormous and complex exercise. Ensuring an accurate count requires immense expertise, resources, and time. The enumerator must use objectively trustworthy methods that are capable of

consistent implementation over decades, and across geographic areas that differ in demographics, population density, and other features. Those methods must produce data precise enough to enable the redistricting body to decide whether to draw a boundary down one street rather than another street one block over. And because the population count is the starting point of redistricting—affecting all other aspects of this often highly contentious process—the States have a particularly strong interest in ensuring that this threshold step is free from the risk of partisan manipulation.

The States have converged on the view that these practical concerns about obtaining reliable population counts are best satisfied by using the federal Census's enumeration of total population as the starting point for state redistricting. See *supra* at 1-9. Many States encountered intractable problems when attempting to conduct their own counts of citizens, voters, or residents. See *supra* at 2-5. The availability of the Census's data on total population resolved these practical difficulties. The resource constraints that hobbled the States' own enumeration efforts do not apply to the Census's decennial count of total population, which is constitutionally mandated and federally funded. The Census Bureau has a "'two hundred year tradition of . . . actually count[ing] people,'" *Wisconsin v. City of N.Y.*, 517 U.S. 1, 10, 18-20 (1996) (quoting Secretary of Commerce), that has given it the experience, expertise, and staff necessary to compile detailed and

accurate counts of total population in every State.[32] And the Bureau's independence from local or state politics, as well as its long-standing dedication to objective scientific methods, has kept it free of the charges of partisan manipulation that plagued the States' own efforts.[33]

The usefulness and reliability of the Census's total-population data have been further strengthened by the States' "unique collaboration" with the Bureau under P.L. 94-171. See *supra* at 5-8. The States have relied on the P.L. 94-171 process for the past four decades to obtain total-population counts that are not only widely recognized as accurate and politically neutral, but are also tailored to every State's individual redistricting needs. See *supra* at 5-7. Through this partnership, state redistricting has become inextricably intertwined with the decennial Census process as States have structured their redistricting practices and deadlines around the certainty that the Census's total-population counts will provide an administrable benchmark for drawing equally populated districts every ten years.

The States' reliance on the Census has also been approved by redistricting experts and the courts. Redistricting manuals advise that the "obvious way" for States to equalize district population "is to use

---

[32] *See* U.S. Bureau of the Census, *2010 Census by the Numbers* (Mar. 2010).

[33] *See* U.S. Bureau of the Census, et al., Statement of Commitment to Scientific Integrity by Principal Statistical Agencies (n.d.).

official Census Bureau population counts."[34] Courts drawing congressional or legislative district maps—and the redistricting experts advising them—use the Census's total-population counts to measure district size. *See, e.g.*, *Hippert v. Ritchie*, 813 N.W.2d 374, 377-78, 382 (Minn. 2012). Although this Court does not mandate that States use the Census for state-level redistricting, *see Burns*, 384 U.S. at 91, it has consistently recognized that the Census provides the "best population data available" for redistricting, *Kirkpatrick v. Preisler*, 394 U.S. 526, 528 (1969); *see Karcher v. Daggett*, 462 U.S. 725, 739 (1983). And both this Court and the lower courts have uniformly upheld districts drawn with relatively equal numbers of total population based on the Census's enumeration. *See, e.g.*, *Brown v. Thompson*, 462 U.S. 835, 838-39 (1983); *Gaffney v. Cummings*, 412 U.S. 735, 737, 748-51 (1973); *see also Chen v. City of Houston*, 206 F.3d 502, 522-28 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212, 1227-28 (4th Cir. 1996); *Garza v. County of L.A.*, 918 F.2d 763, 773-76 (9th Cir. 1990). The States have long relied on this judicial and expert consensus to draw legislative districts with equal numbers of residents.

B. States Lack Any Reliable, Administrable Method to Equalize Districts Based on "Eligible Voter" Population.

Appellants urge this Court to declare unconstitutional the States' universal use of total-population equality and to impose on the States a

---

[34] Wattson, *supra*, at 6-7; *see NCSL Redistricting*, *supra*, at 10.

duty to equalize "eligible voter" population instead. If adopted by this Court, appellants' position would throw state redistricting across the country into chaos, replacing current, administrable practices with a standard that is ill-defined in theory and unworkable in practice.

1. Appellants' position would inject uncertainty at the threshold of the redistricting process by demanding that States comply with an ambiguous constitutional standard. Appellants assert that the Equal Protection Clause requires the States to equalize the number of "eligible voters" in every district but never specify what "eligible voter" means. Br. for Appellants 14-15. The statistics they offer suggest that "eligible voter" could mean a person who is registered to vote, or instead a person who is potentially able to vote but not yet registered to do so. *Id.* at 11-12; *see also* J.S. App 26a (complaint identifying "several different alternative metrics representing the number of electors or potential electors"). But appellants never specify whether the population of potential or registered voters (or some other metric, such as actual voters) is the "controlling consideration" (Appellants Br. 41) that should supplant the States' choices to use total population.

This ambiguity matters because there can be significant disparities in the estimated population of "eligible voters" depending on which metric is used. For example, appellants' own estimates of "eligible voter" population in one Texas senate district span a range from 425,000 registered voters to 574,000 citizens of voting age—a difference of nearly 150,000 people. Appellants Br. 11. Such disparities fundamentally affect any attempt to draw equally populated legislative districts that generally do not

deviate by more than ten percent. *See Brown*, 462 U.S. at 838-39.

As a result, if this Court were to adopt appellants' theory, the absence of a "clear, manageable" definition of "eligible voters" would immediately bog the redistricting process down for years of uncertainty and litigation. *See Vieth v. Jubelirer*, 541 U.S. 267, 307-08 (2004) (Kennedy, J., concurring). Indeed, appellants acknowledge that their theory leaves "implementation issues" to be litigated in the future. See Appellants Br. 44. Neither the courts nor the States should be required to abandon the "workable standards" provided by the Census's total-population count, which have proven through experience to provide an effective and administrable method for equalizing district population, for such an uncertain regime. *See Bartlett v. Strickland*, 556 U.S. 1, 17 (2009) (plurality op.) (emphasizing need for "sound judicial and legislative administration" in redistricting).

2. Even assuming that this Court could settle on a single constitutionally required definition of "eligible voter," the States would be severely hampered in implementing any such rule due to the absence of reliable and detailed data about their populations of potential or registered voters.

a. No existing source of data provides information about the population of potential voters as robust, detailed, or useful as the total-population enumeration provided by the Census to the States through the P.L. 94-171 process. The Census Bureau does not collect information about potential voters as part of its decennial count of "the whole number of persons in each State," U.S. Const. amend. XIV, § 2.

Indeed, the Bureau has expressly declined to collect such information in the past, and it is unlikely to do so in the future due to concerns that asking for such information would interfere with its core constitutional duty to obtain an accurate count of total population. See *supra* at 7. As the Bureau has explained, questions about voting eligibility or citizenship could chill participation from individuals who "perceive[] any possibility of th[is] information being used against them" and would thus "jeopardize the overall accuracy of the population count" required by the Constitution. *Fed. for Am. Immigration Reform v. Klutznick*, 486 F. Supp. 564, 568 (D.D.C. 1980). And even if the Bureau were willing to overlook this concern, it remains the case that any enumeration of potential voters, unlike the Bureau's enumeration of total population, would not be constitutionally required. The absence of a constitutional mandate for the Bureau to count potential voters would subject the States to continuing uncertainty about their ability to rely on the Bureau going forward.

The States are also ill-equipped to obtain an accurate count of the population of potential voters. As the States' past experience with such efforts demonstrates, obtaining precise population figures of potential voters (or any other measure of population) requires significant funding, special expertise, and a large, well-trained staff—resources that are sorely lacking at the state level. See *supra* at 2-4. And even if States could conduct such a massive undertaking, their past experience demonstrates the high risk that state-run counts could be plagued by inaccuracies and charges of improper partisan influence. See *supra* at 2-4. Requiring the States to assume the

responsibility of enumerating their population of potential voters would force them to return to the practices that many States long ago abandoned in favor of the Census's more accurate and reliable enumeration of total population.

b. Appellants and some of their *amici* suggest that reliable information about the potential voter population can be drawn from the estimates of citizen voting-age population (CVAP) in the Census Bureau's annual American Community Survey (Survey). Appellants Br. 11-12, 46; Amicus Br. for Demographers 5-10, 24-27; Amicus Br. for City of Yakima, Wash. 4-5, 19-22. As a threshold matter, CVAP is overinclusive of the actual legal-voter population because it includes voting-age citizens who may nonetheless be legally disqualified from voting due to imprisonment, prior felony conviction, mental incompetence, or some other bar. But even ignoring this disparity, the Survey estimates of CVAP simply do not provide population data as useful or reliable for redistricting as the Census's enumeration of total population.

The Survey estimate of CVAP is not an actual count of voting-age citizens at any point in time, but rather an extrapolation from a small sample (2.5%) of households, typically aggregated over several years.[35] As the Census Bureau has warned, these CVAP

---

[35] U.S. Bureau of the Census, *A Compass for Understanding & Using American Community Survey Data: What General Data Users Need to Know* ("*Understanding ACS*") 1-4 (2008); *see* Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755, 776-78 (2011).

extrapolations, even when statistically sound, simply "do[] not provide official counts of the population" with the same level of confidence as an actual enumeration.[36] Moreover, because the sample size for the Survey is so small, the Bureau cannot generate CVAP data with sufficient accuracy at the level of census blocks—the basic units of legislative map-making—and only recently (in 2011) has been able to generate estimates at the level of larger geographic units such as block groups and census tracts.[37] Thus, aside from being an estimate, CVAP figures simply do not exist at the level of granularity that the States require for purposes of drawing state legislative districts.

Additional uncertainty comes from the fact that there is no single CVAP data set that is the authoritative estimate of the population of voting-age citizens. The Survey produces CVAP figures in three separate data sets encompassing survey responses from the past one, three, or five years, each of which provides different CVAP estimates with different margins of error.[38] And the Bureau updates these three data sets every year, meaning that a single year could be the subject of multiple, overlapping CVAP estimates covering different time periods. (Appellants themselves rely on three different five-year CVAP data sets in their brief. See Appellants Br. 11-12.)

---

[36] *Understanding ACS*, *supra*, at 4.

[37] Persily, *supra*, at 776.

[38] David R. Hanna, Texas Legislative Council, Using Citizenship Data for Redistricting 15-16 (n.d.).

The multiplicity of relevant CVAP data raises many implementation issues. One is that the mere availability of choice raises the risk of partisan manipulation, particularly in States where the legislature controls the redistricting process. As several members of this Court have observed, a legislative body's ability to "select among various estimation techniques" for population risks handing "the party controlling" the redistricting process "the power to distort representation in its own favor." *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 348 (1999) (Scalia, J., concurring). Moreover, courts may have difficulty "reviewing estimation techniques in the future" when disputes arise, "to determine which of them *so obviously* creates a distortion that it cannot be allowed." *See id.* at 349. That is particularly true when, as here, there is no actual count of voting-age citizenship population to serve as a benchmark, leaving courts the unenviable task of adjudicating abstruse disputes between experts over the validity of various statistical techniques. *Id.* States should not be forced to replace the Census's "genuine enumeration"—perhaps "the most accurate way of determining population with minimal possibility of partisan manipulation"—with methods so open to manipulation and uncertainty. *See id.* at 348-49.

Notwithstanding these issues, appellants and their *amici* assert that the Survey's CVAP estimates are sufficiently reliable because States and courts use these estimates in litigation under § 2 of the Voting Rights Act (VRA) to measure voting power for the purpose of evaluating majority-minority districts. *See, e.g.*, Amicus Br. for Demographers 15-20. But CVAP estimates are not used as the dispositive

measure of the number of voters or their voting power in the context of § 2, a statutory provision with its own unique set of legal criteria. Rather, CVAP estimates are simply one piece of a larger and more robust statistical inquiry into whether changes to a redistricting plan dilute minority voting strength in violation of § 2. *See Thornburg v. Gingles*, 478 U.S. 30, 43-51 (1986). Experts usually consider CVAP estimates alongside a broad spectrum of other evidence—including statistical analyses of election results, voter turnout rates, the presence of racially polarized voting, projections of population growth, and lists of Spanish-surname registered voters—to help the States and courts determine whether minority voters retain the opportunity to elect a candidate of their choice in a specific majority-minority district. *See, e.g.*, *Sanchez v. Colorado*, 97 F.3d 1303, 1315-22 (10th Cir. 1996); *Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 732 (N.D. Tex. 2009); *Reyes v. City of Farmers Branch*, No. 07-cv-900, 2008 WL 4791498, at *7-*19 (N.D. Tex. Nov. 4, 2008), *aff'd*, 586 F.3d 1019 (5th Cir. 2009). Appellants and their *amici* propose to use CVAP in a very different way in the redistricting context: as the single dispositive measure of "eligible voter" population for thousands of legislative districts nationwide. Although CVAP may be useful for the specific purpose that it currently serves, there is no evidence that it would remain equally reliable when wrenched from its current context and elevated to the status of a dispositive and constitutionally required metric.

c. Appellants' other metric for "eligible voters"—registered voters—is equally fraught with practical difficulties. At least one State, North Dakota, does not require voter registration at all, making this

metric unavailable there.[39] And in many States, registered-voter rolls are maintained not by any central state agency, but rather by local election boards. Such decentralized processes to gather voter data proved problematic in the past when several States attempted to use counts of registered voters to draw legislative district lines. See *supra* at 2-4. If States were required to rely on this information for redistricting, they would have to fundamentally reform their voter-registration systems to replicate the level of precision and reliability currently provided by the Census's enumeration of total population.

Even if the States could find a way to make workable the process of collecting data about registered voters, using such data would raise additional concerns. As this Court has explained, the use of registered-voter data for state legislative redistricting raises the risk that the population figures controlling the distribution of power for as long as ten years could be subject to "sudden and substantial" fluctuations based on partisan factors that drive voter registration, such as "peculiarly controversial election issue[s] [or] a particularly popular candidate." *Burns*, 384 U.S. at 93 (quotation marks omitted). Indeed, eleven States that authorize voters to register on the day of the election itself often experience such sudden and substantial

---

[39] N.D. Sec'y of State, North Dakota....The Only State Without Voter Registration (July 2015).

increases in the population of registered voters.[40] Moreover, as this Court further reasoned in *Burns*, tying the population base for redistricting to registration increases the risk that "those in political power" will manipulate redistricting for political gain, such as by inflating or suppressing voter registration numbers in certain areas to influence the population count. 384 U.S. at 92-93. As a result of these risks, this Court has warned that redistricting based on registered voters is likely to be invalid unless the result approximates that which would obtain from using a different, "permissible population basis." *Id.*

3. Appellants' response to the enormous practical problems posed by their position is to suggest that such "implementation issues" can be addressed later. Appellants Br. 44. But States would suffer immediate and serious consequences if they are required to redistrict based on "eligible voters" rather than total population. Existing legislative maps in place since the 2010 redistricting cycle could be challenged in courts across the country. States would suddenly face the prospect of counting "eligible voters" without knowing whether to enumerate registered voters, citizens of voting age, or another voter population (such as actual voters). And even if States or courts could settle on a standard, States would not be able to redistrict immediately based on "eligible voter" population because gathering accurate and objective population counts takes "years of research, planning,

---

[40] Nat'l Conference of State Legislatures, *Same Day Voter Registration* (June 2, 2015); Demos, *What Is Same Day Registration? Where Is It Available?* (2014).

testing, and development of methods and infrastructure."[41] This delay and uncertainty would likely throw upcoming state elections into turmoil.

Indeed, the level of chaos that would ensue if this Court were to accept appellants' theory would be far greater than the disruption that followed the Court's rejection of geographically based redistricting in *Reynolds* and other cases. When *Reynolds* was decided, States had the Census's total-population counts readily available to implement the population-based redistricting that this Court required. Many States with bicameral legislatures were already using the Census enumeration to redistrict based on population for at least one of their two legislative bodies.[42] And States were already using the Census's data on total population for federal redistricting. Here, by contrast, no State currently uses "eligible voter" population, and, as discussed above, there is no readily available and reliable data that could be used to redistrict on this basis.

Appellants also suggest that many States could avoid any practical problems because the distributions of people and "eligible voters" in a State might coincide. *See* Appellants Br. 15. But there is no way for a State to make that determination when they do not have reliable data on the population of "eligible voters." And appellants' suggestion that total population and "eligible voter" population might coincide is speculation at best. The distribution of "eligible voters" (however defined) is often uneven in

---

[41] U.S. Bureau of the Census, *About the Census* (Sept. 2015).

[42] *N.Y. Report*, *supra*, at 85-91.

many States—including Texas, New York, California, and Alaska—because certain areas tend to have larger numbers of nonvoters than others. For example:

- Within New York City, one Brooklyn state senate district has a much larger proportion of children (approximately 30% of its total population) than one Manhattan senate district (approximately 9% of its total population) because the Brooklyn district is more residential and home to religious communities that often have many children.[43]
- In Alaska, rural legislative districts often have substantially higher percentages of children than most urban districts—*e.g.*, the population in two rural house districts is approximately 37% children compared with less than 20% in several urban districts—because the Native Alaskan communities living in rural districts often have large families and experience an exodus of voting-age adults moving to cities for educational and employment opportunities.[44]
- In California, immigrant populations are more concentrated in certain parts of the

---

[43] *See* N.Y. Legis. Task Force on Demographic Research & Reapportionment, Senate's Dep't of Justice Submission, Ex. 9 (2012) (Districts 17, 27).

[44] Alaska Redistricting Bd., 2013 Proclamation District Population Analysis (2013).

> State, such as Los Angeles and the Central Valley, and the number of U.S. citizens can be as much as 40% higher in some districts than others.[45]

The serious practical problems posed by appellants' constitutional theory are thus immediate and unavoidable. This Court should not disrupt the States' universal practice of relying on the Census count of total population and trigger these consequences throughout the nation.

II. The States' Use of a Total-Population Base Is Consistent with a Policy of Providing Fair and Effective Representation to Voters and Nonvoters Alike.

In *Burns*, this Court recognized that the population base used by a State for legislative redistricting involves fundamental "choices about the nature of representation" that are entitled to respect under any equal protection analysis. 384 U.S. at 92. Here, the States' universal practice of including nonvoters in the total population considered for redistricting is consistent with the principle that "'equal representation for equal numbers of people'" ensures the "fair and effective representation" of all persons served and affected by state government—including both voters and nonvoters. *Reynolds*, 377 U.S. at 559-60, 565 (quoting *Wesberry v. Sanders*, 376 U.S.1,18 (1964)).

---

[45] David G. Savage & David Lauter, *Supreme Court Redistricting Case Could Reduce Latinos' Political Clout*, L.A. Times, May 26, 2015.

1. Equalizing total population between legislative districts promotes the equal treatment of voters by state legislatures. Appellants' contrary view hinges on an overly narrow and abstract theory of "voter equality" that the States are not obligated to accept. Appellants contend that the Equal Protection Clause compels States to ensure a type of formal equality between voters in the voting booth by giving each potential voter the same relative power to help select a representative. Appellants Br. 19, 41, 46-49. But voters' interest in equal treatment does not end in the voting booth: they also have a strong interest in ensuring that the legislator they elect has the same ability to fairly and effectively represent their interests as other legislators have for their constituents. *Reynolds*, 377 U.S. at 565-66.

As the States' experience demonstrates, however, voters receive fundamentally *unequal* representation when legislative districts have disparate total populations because different legislators must serve and wield the same amount of governmental influence on behalf of different numbers of people. Although each voter in a more-populated district may formally have the same proportional power to elect a representative as a voter in a less-populated district with the same number of voters, the representative from the more-populated district will be over-burdened in the district and underpowered in the legislature compared to her peers. The result is a practical diminution of the power of every vote in more-populated districts. The States' decision to avoid this type of voter inequality by drawing political boundaries based on total-population figures is a reasonable one that this Court has said is

constitutionally permissible and subject to deference. *See Burns*, 384 U.S. at 92.

2. Voters' interest in equally fair and effective representation is affected by the total population in legislative districts because legislators represent all constituents in the districts they serve regardless of whether any particular individual can or did vote. *See Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality op.); *Daly*, 93 F.3d at 1226. As a result, voters are treated unequally in two concrete ways if they reside in a district with a much larger number of residents than another district. *First*, because legislators in practice devote considerable time and effort to "providing services and information" to "both voters and nonvoters," *Calderon v. City of L.A.*, 4 Cal. 3d 251, 259 (1971), voters in more-populated districts will have less ability to voice their concerns to their representative, who will have to divide her time and efforts among many more people than a representative from a less-populated district. *See Kirkpatrick*, 394 U.S. at 531 (recognizing that "[e]qual representation for equal numbers of people" prevents "diminution of access to elected representatives"); *Garza*, 918 F.2d at 774-75 (recognizing that "basing districts on voting population . . . would dilute the access of voting age citizens in that district to their representative").

Second, although the legislator from a more-populated district must represent and meet the needs of a larger group of individuals, she has no greater voting power in the governing body to affect state policy than the legislator from a less-populated district, creating a mismatch between the legitimate interests of her constituents (including voters) and her ability to address those concerns. *See Bd. of*

Estimate v. Morris, 489 U.S. 688, 693-94, 699 (1984) (noting that voters are "shortchanged" if they receive "a smaller share of representation than . . . [voters] in the smaller districts"). That disparity gives rise to the substantial risk that the voters in more-populated districts will be underserved in practice because the distinct needs and concerns of their district—as a reflection of the greater numbers of their residents—were ignored or subordinated in drawing state legislative lines.

The States' historical experience demonstrates how voters can receive unequal treatment from the legislature as a result of disparities in total population. Prior to this Court's decision in *Reynolds*, many States contained districts with substantial population disparities as urban and suburban areas experienced rapid population growth without receiving a proportional increase in representation.[46] As a result, voters in densely populated districts lacked the representation they needed to ensure that state government adequately responded to the distinct problems and policy concerns that their districts faced. For example, voters (and nonvoters) in cities and suburbs faced "overcrowded schools, hospitals, and jails, dilapidated housing, and congested roads."[47] And they grappled with policy concerns that greatly affected more urban, populous areas, such as

---

[46] Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057, 1058-65 (1958).

[47] J. Douglas Smith, *On Democracy's Doorstep* 43 (2014).

labor and employment issues and pollution control.[48] But without legislative power reflective of the total numbers of people affected by these problems, representatives serving urban and suburban districts struggled to set state policies or procure sufficient resources to benefit their constituents.[49] For example:

- In Tennessee, more than 80% of the House districts deviated from an ideal total population by more than 25%.[50] Meanwhile, 23 counties received 57.9% more state-aid funds than they would have received based on a per-capita division of funds.[51]
- In Colorado, schools serving 90,000 children in Denver received $2.3 million in state funding while schools serving 18,000 children in another county received $2.4 million.[52]
- In Kentucky, 2¢ of every $1 of gasoline tax went to maintaining roads in less-

---

[48] *Id.* at 48; *see* U.S. Advisory Comm'n on Intergovernmental Relations, *Apportionment of State Legislatures* 28 (1962).

[49] Smith, *supra*, at 42-43, 48, 61; *see also* Stephen Ansolabehere & James M. Snyder Jr., *The End of Inequality, One person, One Vote and the Transformation of American Politics* 68-74 (2008).

[50] Bureau of Public Admin., Univ. of Tenn., Memorandum on Legislative Apportionment in Tennessee 5 (1961).

[51] Br. for Appellants 13, *Baker v. Carr*, 369 U.S. 186 (1962), 1961 WL 64817.

[52] Richard L. Strout, *The Next Election Is Already Rigged*, Harper's Magazine 35, 37 (Nov. 1959).

populous areas without any similar tax allocation for roads in populous urban areas.[53]

- In California, about one-third of the State's total population controlled more than two-thirds of the representation in the State Senate, and the population of a single district in Los Angeles was 450 times the size of the population of a rural district in the eastern part of the State.[54]

Indeed, before this Court required States to equalize district population, legislators' inability to serve adequately the distinct and increasing concerns of more-populated districts triggered severe disillusionment with state government. For example, in Rhode Island, the lack of proportionate representation to match rapid population growth in industrialized areas contributed to a rebellion in 1841, through which the people bypassed the legislature and ratified by referendum a new constitution that was drafted by constitutional-convention delegates who had been "equitably apportioned according to population."[55] Later, in New York, the lack of government attention to problems facing more-populous suburbs caused Long Island residents to stage a protest during which they dumped barrels of

---

[53] Nat'l Mun. League, *Compendium on Legislative Apportionment*, at Kentucky 4 (2d ed. 1962).

[54] *Silver v. Jordan*, 241 F. Supp. 576, 579 (S.D. Cal. 1964), *aff'd*, 318 U.S. 415 (1965).

[55] Patrick T. Conley, Jr., *One Town, Two Voters; One Man, One Vote: A History of Legislative Apportionment in Rhode Island*, R.I. Bar J. 18, 19-20 (May 1986).

tea into the water and decried "taxation without representation."[56] And a federal commission studying intergovernmental relations in 1955 concluded that the "power and influence" of state government was declining in part because residents of urban areas were seeking public funding and policy solutions from the federal government, which was more equitably apportioned based on total population, after experiencing years of neglect from their state legislatures.[57]

The problems that arose when some legislators had to serve many more people than other legislators would not have been cured by equalizing the number of voters in the districts instead of equalizing the total populations. Even if two districts have the same number of "eligible voters," the fact that one district has a greater population of school-age children, ex-felons, recent immigrants, or other nonvoters will naturally lead to additional issues that the less-populated district does not face, and additional work for that district's representative that the representative from the less-populated district does not have to undertake. Equalizing districts by total population ensures that the legislature is appropriately responsive to the distinct concerns that all residents, including but not limited to voters, face in densely populated areas.

3. The States' experience thus demonstrates that voter equality is protected by drawing state legisla-

---

[56] Smith, *supra*, at 49.

[57] *See* U.S. Advisory Comm'n on Intergovernmental Relations, *A Report to the President for Transmittal to the Congress* 36-40 (1955).

tive lines to take into account everybody affected and served by state government, including nonvoters. This Court's precedents support this broader principle of voter equality. It was in the context of deep discontent over inequalities in the distribution of representation and public resources that the Court ruled in favor of disaffected voters in *Wesberry* and *Reynolds*. In both of these decisions, this Court recognized that disparities in total population were a source of voter debasement. For example, in *Wesberry*—where one Georgia congressional district contained 823,680 people and other districts contained an average of 394,312 people—the Court concluded that "inequality of population" under which one representative "represent[ed] from two to three times as many people" as other representatives, "contract[ed] the value of some votes and expand[ed] that of others." 376 U.S. at 2, 7. In *Reynolds*, after emphasizing the representational inequalities arising from Alabama's distribution of legislators—under which, for example, one state senator represented 600,000 people while another senator represented 15,417 people—the Court determined that providing the "same number of representatives to unequal numbers of constituents" devalued the votes in more-populated districts, 377 U.S. at 546, 562-63. And later, in *Morris*, the Court reaffirmed that a voter is "shortchanged . . . if he may vote for one representative" while "the voters in another district" with a population "half the size also elect one representative." 489 U.S. at 698.

To be sure, this Court's decisions also refer at times to inequalities between voters in their proportional power to elect a candidate. *See* Appellants Br. 22-28. *See, e.g., Hadley v. Junior Coll.*

Dist., 397 U.S. 50, 57 (1970) (apportionment scheme "systematic[ally] discriminat[ed] against voters" by allocating same number of trustees to districts with wide population ranges); *Gray v. Sanders*, 372 U.S. 368, 371-73, 379 (1963) (unit voting system gave more weight to votes from less-populous, rural areas than to votes from more-populous, urban areas). But in these cases, the Court was not faced with the question of precisely how to measure voter equality because the electoral practices or legislative districts challenged in those cases were unequal under any theory. If anything, this Court's recognition that voters were harmed in multiple ways only reinforces the States' prerogative to decide which principle of voter equality to prioritize in making fundamental "choices about the nature of representation" in their governments. *Burns*, 384 U.S. at 92.

Federal apportionment and redistricting further support the principle that voter equality is preserved if legislators serve equally populated districts. By dividing House representatives among the States according to their respective numbers of inhabitants at a time when the franchise was largely restricted to white, male property owners, the Framers set "equal representation for equal numbers of people"—rather than equal numbers of voters—as the "high standard of justice and common sense" in representational government. *Wesberry*, 376 U.S. at 18; *see* U.S. Const. art. I, § 2. The States later reaffirmed this high standard of equal representation by rejecting proposals to reapportion House representatives based on voters and ratifying the Fourteenth Amendment's command to reapportion based on the "whole number of persons in each State." *See* Cong. Globe, 39th Cong., 1st Sess. 2767 (1866).

Appellants contend that federal apportionment and redistricting are wholly inapposite to the constitutionality of state legislative redistricting (Appellants Br. 42-44), but this Court has said otherwise, recognizing that "[t]he equal protection guarantee of 'one person, one vote' extends not only to congressional districting plans," but also "to state legislative districting," *Morris*, 489 U.S. at 692. Appellants' position would create an indefensible tension between the rules governing congressional apportionment and those governing state legislative apportionment. Nothing in the Court's precedents or the Equal Protection Clause remotely suggests that the States are constitutionally forbidden from achieving in state government the same basic level of equality of representation that is constitutionally required in the federal government.

Finally, the adjustments that several States make to the Census's total-population data highlight the States' continuing efforts to preserve voter equality by drawing district lines that reflect all those served and affected by state government. All States begin that process with a total-population count that includes voters and nonvoters alike. Several States have recognized that further refinements may be necessary to preserve equality for voters (and nonvoters) who live in particular districts and thus have strong interests in the concerns of those communities and the representation that those districts receive. For example, four States have determined that incarcerated individuals retain their residences in and legitimate ties to their home communities rather than in the prisons where they reside involuntarily and in isolation from the outside community. See *supra* at 9. These States thus count

incarcerated individuals in their home communities rather than in their prison districts to reflect the States' judgment as to the actual distribution of people who are interested in and represented by the legislators from those districts. And two States have determined that nonpermanent-resident military personnel and students who maintain their permanent homes in a different State have chosen to remain interested primarily in the policies and concerns of another State's government. See *supra* at 8-9. These States thus exclude temporary residents from the redistricting base due to the judgment that the remaining population better reflects the actual population of residents who are most connected to and interested in that State's government.

4. Equalizing total population between state legislative districts thus ensures voter equality in a broader sense than recognized by appellants here. Given this feature of the States' current redistricting practices, appellants' argument fails on its own terms. Moreover, total-population equality also serves the States' interest in recognizing and respecting nonvoters. Although appellants give little weight to this consideration, and indeed suggest that it is irrelevant to the issue presented here (Appellants Br. 39-40), a State's decision to give weight to the presence of nonvoters is also entitled to respect as part of its "choice[] about the nature of representation," *Burns*, 384 U.S. at 92. For example, in California, the voters specifically repealed a prior regime that had prohibited counting "persons who are not eligible to become citizens of the United

States" as part of the population of any district.[58] Likewise, Hawai'i stopped redistricting based on registered voters in part because the concept of "ohana" or family is important in Hawai'ian culture and excluding children from representation was contrary to this tradition.[59]

Many state residents "cannot or do not cast a ballot," *Calderon*, 4 Cal. 3d at 258-59, including children, adults not yet registered to vote, the mentally incompetent, noncitizens, people with past felony convictions, and incarcerated individuals. States may have legitimate reasons to deny these residents the ability to vote. But those reasons do not compel the States to go even further and exclude these populations from the representational process altogether, especially when this Court has upheld the States' right to make a different policy judgment. *See Burns*, 384 U.S. at 92. Like voters, many nonvoters make valuable contributions to state government by paying taxes and contributing to the community in other ways, such as serving in the military, running local businesses, and participating in the labor force. Counting these nonvoters acknowledges their contributions and recognizes that, like voters, they have legitimate concerns that ought to be considered by state legislatures and representatives. By contrast, requiring States to disregard these nonvoters, as appellants seek, would undermine the States' efforts to treat nonvoters equally by including

---

[58] Cal. Const. of 1879, art. IV, § 6; *see* Cal. Sec'y of State, California Ballot Pamphlet–Primary Election, June 3, 1980, at 20-21 (1980).

[59] *Hawai'i Report*, *supra*, at 22.

them in the population base—an effort consistent with the rule that the Equal Protection Clause applies to individuals without regard to their ability to vote. *See Pickett v. Brown*, 462 U.S. 1 (1983) (Equal Protection Clause applies to children); *Plyler v. Doe*, 457 U.S. 202 (1982) (same for noncitizens). The Equal Protection Clause thus does not require the States to give unequal treatment to nonvoting residents whom they have chosen to include in the population base for state legislative redistricting.

CONCLUSION

The judgment of the district court should be affirmed.

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
BARBARA D. UNDERWOOD*
Solicitor General
STEVEN C. WU
Deputy Solicitor General
JUDITH N. VALE
Assistant Solicitor General
(212) 416-8020
barbara.underwood@ag.ny.gov

September 2015

* *Counsel of Record*

(*Counsel listing continues on next page*)

CRAIG W. RICHARDS
Attorney General
State of Alaska
P.O. Box 110300
Juneau, AK 99811

KAMALA D. HARRIS
Attorney General
State of California
P.O. Box 944255
Sacramento, CA 94244

MATTHEW P. DENN
Attorney General
State of Delaware
820 N. French St.
Wilmington, DE 19901

DOUGLAS S. CHIN
Attorney General
State of Hawai'i
425 Queen St.
Honolulu, HI 96813

LISA MADIGAN
Attorney General
State of Illinois
100 W. Randolph St.
12th Floor
Chicago, IL 60601

GREGORY F. ZOELLER
Attorney General
State of Indiana
302 W. Washington St.
IGC-South, 5th Floor
Indianapolis, IN 46204

TOM MILLER
Attorney General
State of Iowa
1305 E. Walnut St.
Des Moines, IA 50319

JANET T. MILLS
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

BRIAN E. FROSH
Attorney General
State of Maryland
200 Saint Paul Pl.
Baltimore, MD 21202

MAURA HEALEY
Attorney General
Commonwealth of
Massachusetts
One Ashburton Pl.
Boston, MA 02108

BILL SCHUETTE
Attorney General
State of Michigan
P.O. Box 30212
Lansing, MI 48909

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301

LORI SWANSON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin
Luther King Jr. Blvd.
St. Paul, MN 55155

PETER F. KILMARTIN
Attorney General
State of Rhode Island
150 S. Main St.
Providence, RI 02903

JIM HOOD
Attorney General
State of Mississippi
P. O. Box 220
Jackson, MS 30205

WILLIAM H. SORRELL
Attorney General
State of Vermont
109 State St.
Montpelier, VT 05609

JOSEPH A. FOSTER
Attorney General
State of New Hampshire
33 Capitol St.
Concord, NH 03301

MARK R. HERRING
Attorney General
Commonwealth of Virginia
900 E. Main St.
Richmond, VA 23219

WAYNE STENEHJEM
Attorney General
State of North Dakota
600 E. Boulevard Ave.
Bismarck, ND 58505

ROBERT W. FERGUSON
Attorney General
State of Washington
1125 Washington St. S.E.
P.O. Box 40100
Olympia, WA 98504

Constitutional and Statutory Provisions on Using Total Population for Redistricting*

State	*Law*	*Legislative Redistricting Base*
Alabama	Const. art. IX, §§ 197-201	House: Census total population Senate: Total population, uses Census
Alaska	Const. art. VI, §§ 1-4, 6, 10	House: Census total population Senate: Census total population
Arizona	Const. art. IV, pt. 2, § 1; Ariz. Rev. Stat. § 16-1103	House: Census total population Senate: Census total population
Arkansas	Const. art. VIII, §§ 2-4	House: Census total population Senate: Total population, uses Census
California	Const. art. XXI, §§ 1-2; Cal. Elec. Code § 21003	Assembly: Total population, uses Census Senate: Total population, uses Census (*Adjusts residence for incarcerated individuals*)

* "Census total population" means the State's law directs use of the Census Bureau's enumeration. "Uses Census" means the State in practice uses the Census Bureau's enumeration.

State	*Law*	*Legislative Redistricting Base*
Colorado	Const. art. V, §§ 46-48	House: Total population, uses Census Senate: Total population, uses Census
Connecticut	Const. art. III, §§ 5-6	House: Unspecified, uses Census Senate: Unspecified, uses Census
Delaware	Const. art. II, §§ 2, 2A; Del. Code tit. 29, §§ 804-805, 804A	House: Census total population Senate: Census total population (*Adjusts residence for incarcerated individuals*)
District of Columbia	D.C. Code § 1-1011.01	Census total population
Florida	Const. art. III, §§ 16, 21; art. X, § 8; Fla. Stat.§ 10.11	House: Total population, uses Census Senate: Total population, uses Census
Georgia	Const. art. III, § 2, ¶ II	House: Unspecified, uses Census Senate: Unspecified, uses Census

State	*Law*	*Legislative Redistricting Base*
Hawaii	Const. art. IV, §§ 4-6; Haw. Rev. Stat. § 25-2	Permanent residents Permanent residents (*Census total population adjusted to exclude nonpermanent resident military and students*)
Idaho	Const. art. III, §§ 2, 4-5; Idaho Code § 72-1506	House: Census total population Senate: Census total population
Illinois	Const. art. IV, §§ 1-3;	House: Total population, uses Census Senate: Total population, uses Census
Indiana	Const. art. IV, §§ 2, 5	House: Census total population Senate: Census total population
Iowa	Const. art. III, §§ 34-35; Iowa Code §§ 42.2, 42.4	House: Census total population Senate: Census total population
Kansas	Const. art. X, § 1; Kan. Stat. §§ 11-301 to -305	Permanent residents Permanent residents (*Census total population adjusted to exclude nonpermanent resident military and students*)

State	*Law*	*Legislative Redistricting Base*
Kentucky	Const. § 33; Ky. Rev. Stat. § 5.010	House: Total population, uses Census Senate: Total population, uses Census
Louisiana	Const. art. III, § 6	House: Census total population Senate: Census total population
Maine	Const. art. IV, pt. 1, §§ 2-3; art. IV, pt. 2, §§ 1-2	House: Uses Census total population Senate: Uses Census total population[a]
Maryland	Const. art. III, §§ 2-5; Md. Code State Gov't § 2-2A-01	House: Total population, uses Census Senate: Total population, uses Census (*Adjusts residence for incarcerated individuals*)
Massachusetts	Const. art. CI, §§ 1-2; arts. CIX, CXVII, CXIX	House: Census total population Senate: Census total population

[a] Me. Const. art. IV, pt. 1, § 2 and pt. 2, § 2 provide for dividing representatives and senators based on "the number of inhabitants of the State exclusive of foreigners not naturalized according to the latest Federal Decennial Census." Because the Census does not provide any counts of noncitizens, Census total population is used in practice.

State	*Law*	*Legislative Redistricting Base*
Michigan	Const. art. IV, §§ 2-3; Mich. Comp. Laws § 4.261	House: Total population, uses Census Senate: Census total population
Minnesota	Const. art. IV, §§ 2-3	House: Total population, uses Census Senate: Total population, uses Census
Mississippi	Const. art. XIII, § 254; Miss. Code § 5-3-99	House: Census total population Senate: Census total population
Missouri	Const. art. III, §§ 2, 5, 7, 10	House: Census total population Senate: Census total population
Montana	Const. art. V, §§ 2, 14;	House: Total population, uses Census Senate: Total population, uses Census
Nebraska	Const. art. III, § 5	Unicameral: Uses Census total population[b]

[b] Neb. Const. art. III, § 5 provides for dividing districts based on "population excluding aliens, as shown by the next preceding federal census." Census total population is used in practice.

State	*Law*	*Legislative Redistricting Base*
Nevada	Const. art. IV, § 5; art. XV, § 13	Assembly: Census total population Senate: Census total population (*Constitution authorizes state-conducted census if necessary; uses Census*)
New Hampshire	Const. pt. 2, arts. 9, 9-a, 11, 26	House: Census total population Senate: Total population, uses Census (*Legislature authorized to adjust for nonpermanent residents but no such statute currently in force*)
New Jersey	Const. art. IV, § 2, ¶¶ 1, 3; art. IV, § 3	Assembly: Census total population Senate: Census total population
New Mexico	Const. art. IV, § 3	House: Unspecified, uses Census Senate: Unspecified, uses Census

State	*Law*	*Legislative Redistricting Base*
New York	Const. art. III, §§ 3-5, 5-a;[c] Legis. Law § 83-m Corr. Law § 71 State Law §§ 120, 123	Assembly: Census total population Senate: Census total population (*Adjusts residence for incarcerated individuals*)
North Carolina	Const. art. II, §§ 2-5	House: Total population, uses Census Senate: Total population, uses Census
North Dakota	Const. art IV, §§ 1-2; N.D. Cent. Code § 54-03-01.5	House: Total population, uses Census Senate: Total population, uses Census
Ohio	Const. art. XI, §§ 1-4, 6, 9-0	House: Census total population Senate: Census total population
Oklahoma	Const. art. V, §§ 9A, 10A, 11A	House: Census total population Senate: Census total population

[c] N.Y. Const. art. III, §§ 3-5 refer to dividing districts based on "inhabitants, excluding aliens," but a constitutional amendment replaced this phrase with the term "the whole number of persons," *id.* § 5-a, abrogating any requirement to exclude aliens.

State	*Law*	*Legislative Redistricting Base*
Oregon	Const. art. IV, §§ 6-7; Or. Rev. Stat. § 188.010	House: Total population, uses Census Senate: Total population, uses Census
Pennsylvania	Const. art. II, §§ 16-17	House: Total population, uses Census Senate: Total population, uses Census
Puerto Rico	Const. art. III, §§ 2-4	House: Total population, uses Census Senate: Total population, uses Census
Rhode Island	Const. art. VII, § 1; art. VIII, § 1	House: Total population, uses Census Senate: Total population, uses Census
South Carolina	Const. art. III, §§ 3-6	House: Total population, authorizes adoption of Census as state enumeration, uses Census Senate: Total population, authorizes adoption of Census as state enumeration, uses Census
South Dakota	Const. art. III, § 5	House: Census total population Senate: Census total population

State	*Law*	*Legislative Redistricting Base*
Tennessee	Const. art II, § 4-5, 6; Tenn. Code §§ 3-1-102–103	House: Total population, uses Census Senate: Total population, uses Census
Texas	Const. art. III, §§ 25-26, 28	House: Census total population Senate: Unspecified, uses Census
Utah	Const. art. IX, § 1; Utah Code §§ 36-1-101.5, 36-1-201.5	House: Census total population Senate: Census total population
Vermont	Const. Ch. II, §§ 13, 18, 73; Vt. Stat. tit. 17, § 1902	House: Census total population Senate: Census total population
Virginia	Const. art. II, § 6; art. IV, § 2-3	House: Total population, uses Census Senate: Total population, uses Census
Washington	Const. art. II, § 43; Wash. Rev. Code § 44.05.090	House: Census total population Senate: Census total population[d]

[d] Wash. Const. art. II, § 43 provides that "nonresident military personnel" shall be excluded from the population base, which refers to military personnel living outside of the United States.

State	*Law*	*Legislative Redistricting Base*
West Virginia	Const. art. VI, §§ 4, 6-7, 10	House: Total population, uses Census Senate: Census total population
Wisconsin	Const. art. IV, § 3	Assembly: Total population, uses Census Senate: Total population, uses Census
Wyoming	Const. art. III, §§ 3, 48	House: Census total population Senate: Census total population

No. 14-940

Supreme Court, U.S.
FILED
SEP 25 2015
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

ZACHARY W CARTER
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov
Counsel for Amicus Curiae

RICHARD DEARING*
CECELIA CHANG
KATHY PARK
CELIA RHOADS

*Counsel of Record

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 7

I. Relying on a Political Model That Equalizes Representation of Residents Is Critical to New York City's Mission to Serve and Protect Its Residents, Families, and Neighborhoods. 8

A. The City Has a Compelling Interest in Counting Non-Citizen Immigrants. 11

B. The Provision of Public Education to Children is an Investment in the City's Future and Their Interests Must Be Adequately Represented in Local Government. 16

C. Counting Incarcerated Residents Enables the City to Support Their Successful Reentry and Provide Necessary Resources to Their Home Communities 20

II. This Court Should Adhere to Its Longstanding Precedent Given the Extensive Reliance on *Reynolds* by New York City and Other Local Governments..... 23

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

CASES

Aliessa v. Novello,
96 N.Y.2d 418 (2001) 11

Ambach v. Norwick,
441 U.S. 68 (1979)..... 17

Bd. of Estimate v. Morris,
489 U.S. 688 (1989)..... 25

Bush v. Vera,
517 U.S. 952 (1996)..... 24

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 7

Gaffney v. Cummings,
412 U.S. 735 (1973)..... 7

Garcia v. San Antonio Metro. Transit Auth.,
469 U.S. 528 (1985)..... 9

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1990) 8, 10

Graham v. Richardson,
403 U.S. 365 (1971)..... 9

Hilton v. S.C. Pub. Rys. Comm'n,
502 U.S. 197 (1991)..... 24

In re Griffiths,
413 U.S. 717 (1973) 10

Kirkpatrick v. Preisler,
394 U.S. 526 (1969) 8

Longway v. Jefferson County Bd. of Supervisors,
83 N.Y.2d 17 (1993) 10

Milliken v. Bradley,
418 U.S. 717 (1974) 18

Nat'l League of Cities v. Usery,
426 U.S. 833 (1976) 9

Obergefell v. Hodges,
135 S. Ct. 2584 (2015) 10

Plyler v. Doe,
457 U.S. 202 (1982) 9, 16

Reynolds v. Sims,
377 U.S. 533 (1964) 4, 24

Sch. Dist. of Abington Twp. v. Schempp,
374 U.S. 203 (1963) 17

Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623 (2014) 26

Shelby County v. Holder,
133 S. Ct. 2612 (2013) 26

United States v. Int'l Bus. Machs. Corp.,
517 U.S. 843 (1996) 24

Wisconsin v. Yoder,
406 U.S. 205 (1972) 16

WMCA, Inc. v. Lomenzo,
377 U.S. 633 (1964) 24

STATUTES AND REGULATIONS

36 Fed. Reg. 5809 (Mar. 27, 1971) 26

42 U.S.C. § 1395dd 9

Chi. Mun. Code § 2-8-300 28

N.Y. Correction Law § 71(8) 23

N.Y. Election Law § 5-106 20

N.Y.C. Charter § 52 27

N.Y.C. Local Law No. 35 13

S.F. Charter § 13.110(d) 28

San Diego Charter § 5.1 28

Wichita Charter Ordinance No. 173 28

CONSTITUTIONAL PROVISIONS

N.Y. Const. art. III, § 5-a 25

U.S. Const. amend. XIV, § 1 ..... 7, 9, 24

OTHER AUTHORITIES

Alan Finder, *The 1989 Elections: Overhaul of New York City Charter Is Approved, Polls Show*, N.Y. Times (Nov. 8, 1989) 26

Americas Society/Council on the Americas, *Immigration and New York City: The Contributions of Foreign–Born Americans to New York's Renaissance, 1975–2013*. 12

Analysis of 2009-2013 American Community Survey data by the Population Division, N.Y.C. Dep't of City Planning 4, 11, 14, 15

Analysis of 2010 Decennial Census data by the Population Division, N.Y.C. Dep't of City Planning. 18, 19

Carma Hogue, *Government Organization Summary Report: 2012*, U.S. Census Bureau .. 1, 5

Current Population Estimates, N.Y.C. Dep't of Planning 1

Matthew Gardner, Sebastian Johnson, & Meg Wiehe, *Undocumented Immigrants' State & Local Tax Contributions*, The Institute on Taxation & Economic Policy (Apr. 2015) 10

Mayor's Executive Order No. 41 14

Mayor's Executive Order No. 120 14

Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755, 757 (2011) 28

N.Y.C. Districting Comm'n, *Submission for Preclearance of the Final Districting Plan for the Council of the City of New York* (Mar. 22, 2013) 27

N.Y.C. Districting Comm'n, *Submission under Section 5 of the Voting Rights Act for Preclearance of 1991 Redistricting Plan for New York City Council* (Jun. 17, 1991) 2

Nicole D. Porter, *Expanding the Vote: Felony Disenfranchisement Reform, 1997-2010*, The Sentencing Project (Oct. 2010) 20

Patricia Allard and Kirsten D. Levingston, *Accuracy Counts: Incarcerated People & the Census*, The Brennan Center for Justice (2004) 21

Population Facts, N.Y.C. Dep't of Planning 1, 3

Quinnipiac Univ. Polling Inst., *New York Voters Back Fracking, Despite Concerns, Quinnipiac University Poll Finds; More Women in Government Means Fewer Sex Scandals*, Quinnipiac Univ. (Aug. 11, 2011) 22

Sponsor's Memo, *reprinted in* Bill Jacket for Ch. 57 (2010) 23

Superintendent's Final Redistricting and Closure Recommendations, Atlanta Public Schools (May 7, 2012) 19

The Role of Immigrants in the New York City Economy, Office of the New York State Comptroller (Nov. 2013) 12

U.S. Census Bureau, 2010 Census Public Law File Prisoner Adjusted LATFOR Population. 22

Voting Rights Act: Evidence of Continued Need: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 1840 (2006) 27

INTEREST OF AMICUS CURIAE

There are over 90,000 local governments in the United States.[1] All would be impacted if this Court now interpreted the Constitution to mandate legislative districting based on the number of eligible voters instead of total population, the settled standard this Court has upheld for decades.

New York City is the largest municipal government in the nation.[2] The City is home to nearly 8.5 million residents, more residents than the total population of all but the ten most populous states.[3] Among those residents are millions of individuals integral to the City's economic, social, and civic life who are ineligible to vote.[4] Because of its size and history, New York City has a particularly vital interest in affirming that it is constitutional for local governments to

---

[1] Carma Hogue, *Government Organization Summary Report: 2012*, U.S. Census Bureau (Sept. 26, 2013), http://www2.census.gov/govs/cog/g12_org.pdf.

[2] *Current Population Estimates*, N.Y.C. Dep't of Planning, http://www.nyc.gov/html/dcp/html/census/popcur.shtml (last visited Sept. 25, 2015).

[3] *Id.*; *Population Facts*, N.Y.C. Dep't of Planning, http://www.nyc.gov/html/dcp/html/census/pop_facts.shtml (last visited Sept. 25, 2015).

[4] *Id.*

equalize political representation by apportioning voting districts based on equal numbers of total residents.

New York City's most valuable asset is the extraordinary diversity of its residents, including many non-citizen residents and large numbers of children. To reflect that diversity and the importance of all of its residents, and guided by this Court's equal-protection precedents, New York City has for decades used total population as the basis for apportionment in its local legislative body, the Council of the City of New York (the "City Council").[5] Under this longstanding system of apportionment, New York City is divided into 51 districts containing roughly equal numbers of residents, and each district is represented by a single, elected City Council member. Many other local governments use a single-member district system as well.

New York City urges this Court to reaffirm the constitutionality of apportionment by total population, which ensures that the voices of all residents, not just eligible voters, are represented in the democratic process. This commitment to inclusiveness and fair representation is central to the City's identity and critical to its success.

---

[5] *See* N.Y.C. Districting Comm'n, *Submission under Section 5 of the Voting Rights Act for Preclearance of 1991 Redistricting Plan for New York City Council* (Jun. 17, 1991), at 11.

New York City today is a global center of trade, investment, and culture. The City fuels both the State and national economy. New York City's local democracy additionally serves as a laboratory for public policy innovation and is at the forefront of efforts to develop novel solutions to our county's most pressing challenges. The continued ability of New York City to make these contributions to the State and country at large is contingent on an apportionment scheme that incorporates the voices of all residents.

Requiring states and local governments to draw districts based on voting population, as appellants ask this Court to do, would result in serious harm, both in New York City and in municipalities across the country. Compared to other local governments, this harm would be amplified in New York City because of its extremely large population, its particular geography, and the wide-ranging diversity of its residents. New York City's population is greater than that of forty out of fifty states, yet its residents live within a much more confined geographical area.[6] Apportionment by voting population would create dramatic shifts in district boundaries and extreme population inequalities across districts that would leave large groups of residents unrepresented and unaccounted

---

[6] *Population Facts*, N.Y.C. Dep't of Planning, http://www.nyc.gov/html/dcp/html/census/pop_facts.shtml (last visited Sept. 25, 2015).

for in New York City government. This is largely because non-citizen immigrants, children, and disenfranchised incarcerated residents and parolees tend to be concentrated in specific neighborhoods.[7] These shifts in representation would undermine the health of New York City's democracy and cripple its ability to adequately respond to the needs of its many residents. This Court's prior rule under *Reynolds v. Sims*, 377 U.S. 533 (1964), establishing total population as a constitutional basis for legislative apportionment should remain in place.

SUMMARY OF THE ARGUMENT

Like most other states and local governments, New York City has for decades used total population to apportion voting districts. The established, nationwide use of total population as the relevant measure is no accident. It stems directly from this Court's guidance in *Reynolds* and following decisions—all repeatedly confirming the constitutionality of total population as the standard for districting purposes. Use of total population is not only blessed by this Court's precedent; it also conforms with fundamental tenets of representational democracy by confirming that all residents are entitled to equal representation, a

---

[7] Analysis of 2009-2013 American Community Survey data by the Population Division, N.Y.C. Dep't of City Planning.

principle of particular importance given the nation's historic commitment to diversity, inclusion, and robust civic involvement and debate.

Apportionment by total population reflects and supports our fundamental constitutional commitment to equality. Based on its experience, New York City believes that apportionment by total population is most faithful to constitutional standards. At a minimum, use of total population should be upheld as constitutionally permissible. Switching constitutional course and now mandating an inflexible alternative "total voting population" standard, as appellants urge, would harm the mission and function of local governments. The impact on New York City, the nation's largest municipal government, illustrates why this Court should not overrule settled constitutional precedent and compel the over 90,000 local governments nationwide[8] to embark on a novel constitutional experiment with vast political and practical consequences.

As this brief explains, in New York City, the use of total population to equalize City Council voting districts accords with the City's pragmatic mission to provide services to all of its residents, including non-citizen immigrants, children, and

---

[8] Carma Hogue, *Government Organization Summary Report: 2012*, U.S. Census Bureau (Sept. 26, 2013), http://www2.census.gov/govs/cog/g12_org.pdf.

disenfranchised prisoners and parolees, all of whom are ineligible to vote but form an integral part of their communities. The "total voting population" measure fails to capture the reality that local governments confront: families and neighborhoods are the building blocks of our cities and towns, and the stability and success of all residents, regardless of their eligibility to vote, strengthens the community as a whole.

Counting every resident for districting purposes aligns with both legal realities and good policy. The City is not only required by law to provide key services for everyone, but also uses these services to encourage the social and economic contributions of immigrants, educate future generations of citizens, and support the communities most affected by mass incarceration. New York City (like other local governments) should not be now barred from using total population as its apportionment base to accomplish those goals and to ensure that all residents are represented in the City Council. This method of apportionment is protected by this Court's longstanding precedent recognizing the constitutionality of the use of total population as the measure for drawing voting districts. It is also a clear, proven, and workable rule for local governments to follow, unlike the new and untested "total voting population" standard proposed by appellants here.

ARGUMENT

This Court has long recognized that "the apportionment task, dealing as it must with fundamental choices about the nature of representation, is primarily a political and legislative process." *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973) (inner citations and quotation marks omitted).

Along with most other states and localities in the nation, New York City has for decades drawn districts based on total population, relying on *Reynolds* which settled that apportionment by total population comports with the equal protection guarantee of "one person, one vote." Apportionment by total population accords with principles of equal protection, because it ensures that each elected official is responsible to an equal number of residents. It also equalizes the people's ability to "make their wishes known" to their elected representatives, *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137, *reh'g denied*, 365 U.S. 875 (1961), by preventing population disparities across districts that would cause residents of more populous districts to suffer severely diminished access to their elected representatives and, as a result, vital public goods and services, *Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990); *see also Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) (noting that the principle of "[e]qual representation for equal

numbers of people" is also designed to prevent "diminution of access to elected representatives").

This Court should affirm the constitutionality of this longstanding practice of drawing districts based on total population. Apportionment by total population is necessary to ensure that the government will be responsive to the needs of all its residents—including those ineligible to vote—and provides greater opportunities for residents to influence the governmental decisions that have the greatest effects on their daily lives.

I. Relying on a Political Model That Equalizes Representation of Residents Is Critical to New York City's Mission to Serve and Protect Its Residents, Families, and Neighborhoods.

Counting all residents for the purposes of apportionment, regardless of their eligibility to vote, should remain, at minimum, a constitutionally permissible option for localities. Use of total population is especially appropriate on the municipal level because cities provide many key governmental services such as "fire prevention, police protection, sanitation, public health, and parks and recreation." *See Nat'l League of Cities v. Usery*, 426 U.S. 833, 851 (1976) (identifying traditional public services furnished by state and local governments), *overruled on other grounds by*

Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

By law, many of these services are constitutionally guaranteed to all eligible residents, not just those entitled to vote. *See, e.g., Plyler v. Doe*, 457 U.S. 202 (1982) (holding that state statute denying free public education to illegal immigrants violated the Equal Protection Clause); *Graham v. Richardson*, 403 U.S. 365 (1971) (holding that state statute requiring either citizenship or fifteen years of residence to be eligible for welfare benefits violated the Equal Protection Clause); *see also* 42 U.S.C. § 1395dd (banning hospitals from denying emergency care based on insurance status or ability to pay, regardless of citizenship status).

But even setting these legal requirements aside, it is simply good policy for cities to provide governmental services to all eligible residents. Providing and expanding services is a way for cities to attract residents and fuel economic growth. The entire community is also better served when the healthcare, safety, and education needs of all of its residents are met. And on a symbolic level, inclusion in the apportionment base serves as recognition that non-voter populations count and share the same status as voters before the government. Exclusion from the apportionment base sends the harmful message that these groups do not matter. *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (noting, in an analogous context, that exclusion from marriage status "has the effect

of teaching that gays and lesbians are unequal in important respects").

Also relevant is the fact that most of these residents pay taxes that help fund city services.[9] *In re Griffiths*, 413 U.S. 717, 722 (1973); *Longway v. Jefferson County Bd. of Supervisors*, 83 N.Y.2d 17, 23 (1993). It is critical that residents ineligible to vote are able to make their wishes known to their representatives by petitioning the government without suffering diminished access, because the ability to petition is the primary means by which they may "influence how their tax dollars are spent." *Garza*, 918 F.2d at 775.

This Court's precedent recognizes the constitutionality of apportionment schemes that count all residents as constituents to ensure that local representative bodies are responsive to the diverse needs of all community members. Requiring cities like New York City to ignore the existence of these residents for the purposes of representation and apportionment would effectively wipe millions of individual residents and entire families off the

---

[9] In 2012, for example, undocumented immigrants in New York State paid an estimated $1.1 billion in sales, property, and state and local income taxes. Matthew Gardner, Sebastian Johnson, & Meg Wiehe, *Undocumented Immigrants' State & Local Tax Contributions*, The Institute on Taxation & Economic Policy, at 13 (Apr. 2015), http://www.longislandwins.com/downloads/undocumentedtaxes2015.pdf.

map, rendering those residents and their unique needs invisible to our local democracy.

A. The City Has a Compelling Interest in Counting Non-Citizen Immigrants.

This brief describes the City's compelling interest in counting three essential groups of residents for districting purposes. One of those groups is the City's large population of non-citizen immigrants. The City benefits substantially from its large and diverse immigrant population, *see Aliessa v. Novello*, 96 N.Y.2d 418, 431 (2001), and has a corresponding interest in ensuring representation for that population.

Throughout its history, New York City has served as the country's main gateway for immigrants and continues to serve as a major point of entry today. Although New York City accounts for roughly forty-two percent of New York State's total population, it is home to seventy-one percent of the state's foreign-born residents.[10] Over a third of New York City residents are foreign-born, and approximately eighteen percent of all New York City residents—over 1.4 million—are not citizens.[11]

---

[10] Analysis of 2009-2013 American Community Survey data by the Population Division, N.Y.C. Dep't of City Planning.

[11] *Id.*

Immigrant residents are vital to New York City's social fabric and its economic prowess. The City owes much of its rich culture and extraordinary diversity to its immigrant residents. Immigrants also help drive the City's economy: in 2011, they made up forty-four percent of the City's workforce and accounted for $210 billion in the City's economic activity.[12] From 2000 to 2011, the ten Census-defined neighborhoods with the highest concentrations of immigrants showed stronger business growth than the rest of the City.[13] One study estimated that $500 billion of the City's local property tax revenue and $188 billion in home equity over the last thirty years are attributable to immigrants.[14] The City is also home to dozens of ethnic enclaves—such as Chinatown and Little Italy—that serve as key tourist attractions and cultural centers.

---

[12] *The Role of Immigrants in the New York City Economy*, Office of the New York State Comptroller (Nov. 2013), http://www.osc.state.ny.us/reports/immigration/NYC_Immigration_Rpt_8-2014.pdf.

[13] *Id.*

[14] Americas Society/Council on the Americas, *Immigration and New York City: The Contributions of Foreign-Born Americans to New York's Renaissance, 1975–2013*, http://www.as-coa.org/sites/default/files/NYCImmigrationReport2014.pdf (last visited Sept. 24, 2015).

New York City counts its millions of immigrant residents, regardless of their citizenship status, when compiling population figures for the purpose of apportioning City Council districts. The inclusion of immigrant residents in the City's democracy has led to concrete laws and policies that benefit immigrant communities. For example, the Mayor's Office of Immigrant Affairs (MOIA) is a city-chartered agency dedicated to supporting immigrants' well-being and linking them to governmental services and resources.[15] Additionally, city law requires that all agencies responsible for direct public services make available free translation and interpretation services to people who need them. *See* Mayor's Executive Order No. 120. And in 2014, the City Council passed and Mayor Bill de Blasio signed Local Law No. 35, creating a municipal identification card, known as the "IDNYC," which is available to all residents, regardless of immigration status. This program is aimed at ensuring that all New Yorkers, particularly non-citizens, have equal access to key government services, are able to open checking accounts, and can meaningfully interact with and seek assistance from police officers and other government officials. New York City actively encourages immigrants to seek out the services, benefits, and programs that

---

[15] New York City Mayor's Office of Immigrant Affairs, http://www.nyc.gov/html/imm/html/about/about.shtml (last visited Sept. 24, 2015).

they are eligible to receive. *See* Mayor's Executive Order No. 41.

New York City's inclusive system of apportionment reflects its belief that non-citizen residents are constituents of the City's elected officials, rightful consumers of city services, and should be governed by a local democracy that is responsive to the unique needs of immigrants and the communities in which they live. Equal representation of these residents is especially critical in New York City, where certain areas are substantially more likely than others to contain large numbers of immigrant residents, and non-citizen residents in particular. This unequal distribution occurs at both the borough and neighborhood levels. For example, twenty-two percent of residents in the borough of Queens (approximately 496,132 in total) are non-citizens, compared to only eight percent in the borough of Staten Island (approximately 36,476 in total).[16] In fact, eight out of the ten New York City neighborhoods with the highest percentage of non-citizen residents are located in Queens.[17] In the Queens neighborhoods of North Corona and Elmhurst, non-citizen residents account for approximately fifty-three percent and forty-two

---

[16] Analysis of 2009-2013 American Community Survey data by the Population Division, N.Y.C. Dep't of City Planning.

[17] *Id.*

percent of the neighborhood populations respectively.[18] By contrast, in no neighborhood in Staten Island do non-citizens comprise more than seventeen percent of residents.[19]

Preventing New York City from counting non-citizen immigrant residents when apportioning City Council districts would disproportionately harm communities like North Corona and Elmhurst. Nearly 63,000 non-citizen residents would be excluded in these two neighborhoods alone, a number roughly the size of the population of Greenville, South Carolina or Santa Cruz, California.[20] These communities would see devastating reductions in their ability to influence critical public policy decisions. As a result, the special needs of these communities would be woefully underrepresented in New York City democracy, despite the tremendous contributions of their residents and the city services their residents consume and are entitled to receive.

---

[18] *Id.*

[19] *Id.*

[20] *Id.*

B. The Provision of Public Education to Children is an Investment in the City's Future and Their Interests Must Be Adequately Represented in Local Government.

Similar problems arise from excluding residents under the age of eighteen from legislative district populations. Public education for children is one of the most critical public services provided by local government and represents an investment in the future health of the community and our future citizens and voters. *Plyler*, 457 U.S. at 221 ("[E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all.").

Education further plays a "pivotal role . . . in sustaining our political and cultural heritage." *Id.*; *see also Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) ("[As] . pointed out early in our history, . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence."); *Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893, 905 (2003) ("[A] sound basic education conveys not merely skills, but skills fashioned to meet a practical goal: meaningful civic participation in contemporary society."). This Court has recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government," *Sch. Dist. of Abington Twp. v.*

Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring), and as the primary vehicle for transmitting "the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). Indeed, this concept is reinforced by the scores of New York City public schoolchildren who have grown up to become future government leaders.[21]

Children are the consumers of one of New York City's most vital public goods and an investment in the future success of our democracy. Accordingly, the communities in which they live must receive adequate representation to address their unique needs. This is particularly true at the local level, where critical education policy decisions are made.

---

[21] Notable attendees of New York City public schools include U.S. Supreme Court Justices Ruth Bader Ginsberg, Elena Kagan, and Antonin Scalia; former U.S. Attorney General Eric Holder; U.S. Senators Charles Schumer and Bernard Sanders; former U.S. Senator Norman Coleman; former New York City Comptroller John Liu; Hon. Denny Chin of the U.S. Court of Appeals for the Second Circuit; former Chief Justice of New Jersey Supreme Court Deborah Poritz; former Associate Justice of the Appellate Division of the Supreme Court of New York, Second Department, Barry Cozier; N.Y.S. Supreme Court Judge Milton Tingling; and Congresswoman Grace Meng. Many New York City Council Members have also graduated from the New York City public school system, including current Council Members Margaret Chin, Costa Constantinides, Laurie Cumbo, Inez E. Dickens, Rafael L. Espinal, Vanessa L. Gibson, Andy King, Ben Kallos, Karen Koslowitz, Rory Lancman, Alan Maisel, Darlene Mealy, Rosie Mendez, I. Daneek Miller, Mark Treyger, Jimmy Vacca, Jimmy Van Bramer, Jumaane D. Williams, and Ruben Wills.

See Milliken v. Bradley, 418 U.S. 717, 741-42 (1974) ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

And, much like immigration, certain New York City communities are disproportionately affected by those public policy decisions. Approximately twenty-seven percent of residents in the borough of the Bronx are under the age of eighteen, compared to only fifteen percent in the borough of Manhattan.[22] In fact, all five City Council districts with the lowest proportion of children residents are located in Manhattan and are geographically contiguous.[23] Only eight percent of the residents in City Council District 3, which covers the Manhattan neighborhoods of Hell's Kitchen, Chelsea, the West Village and parts of the Upper West Side, are under the age of eighteen.[24]

By contrast, four out of the five districts with the highest proportion of children residents are

---

[22] Analysis of 2010 Decennial Census data by the Population Division, N.Y.C. Dep't of City Planning.

[23] *Id.*

[24] *Id.*

located in the Bronx.[25] Nearly a third of the residents in City Council District 15, which covers the central Bronx, including the neighborhoods of Belmont and Fordham, are under the age of eighteen.[26] The same is true of City Council District 44 in Brooklyn, which covers the neighborhoods of Borough Park, Midwood, and Bensonhurst.[27]

Communities like Belmont and Midwood are major consumers of city services and public goods that are vital to the health and future success of New York City. However, the ability of these communities, which are most impacted by and best positioned to influence policy decisions affecting children, would be severely diluted were children to be excluded from City Council district population counts. In Council Districts 15 and 44 alone, nearly 102,000 children would be erased from the population, roughly double the number of students enrolled in the entire public school system of Atlanta, Georgia.[28]

---

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*; *Superintendent's Final Redistricting and Closure Recommendations*, Atlanta Public Schools (May 7, 2012), http://www.atlantapublicschools.us/cms/lib/GA01000924/Centricity/Domain/45/Final%20-%20Version%20Posted%20May%207.pdf.

C. Counting Incarcerated Residents Enables the City to Support Their Successful Reentry and Provide Necessary Resources to Their Home Communities.

New York City also has a vital interest in ensuring the adequate representation of its incarcerated residents and the communities to which they will return after their incarceration terms are completed. In New York State, individuals who have been convicted of a felony cannot vote while incarcerated or on parole. N.Y. Election Law § 5-106. As a result, approximately 122,018 New York State residents are ineligible to vote because of felony convictions, according to recent estimates.[29] Incarcerated residents are also far from evenly distributed throughout the general population, and the devastating effects of mass incarceration have fallen disproportionally upon the shoulders of certain communities, many of which are located in New York City. These communities are both uniquely harmed by the removal of large numbers of residents to prisons scattered throughout the State and are also tasked with the great responsibility of supporting and encouraging the successful reentry of formerly incarcerated individuals upon release. After all, the

---

[29] Nicole D. Porter, *Expanding the Vote: Felony Disenfranchisement Reform, 1997-2010*, The Sentencing Project, at 21 (Oct. 2010), http://www.sentencingproject.org/doc/publications/publications/vr_expandingthevotefinaladdendum.pdf.

vast majority of incarcerated persons return to the communities in which they lived prior to incarceration.[30] The successful reentry of these community members depends upon the ability of local governments to adequately respond to the needs of the communities to which they are returning.

If New York City were required to remove disenfranchised parolees and residents who are incarcerated throughout the State from the population counts of their home neighborhoods, the communities most affected by criminal justice policies would experience diminished political power to influence those policies relative to their neighbors in other parts of the City. For example, the Brooklyn neighborhoods of Brownsville and Ocean Hill would likely face reductions in population roughly sixty-six times greater than those faced by the Manhattan neighborhoods of Chelsea and Hell's Kitchen, where residents are far less likely to come into contact with the criminal justice system and, as a result, face

---

[30] Patricia Allard and Kirsten D. Levingston, *Accuracy Counts: Incarcerated People & the Census*, The Brennan Center for Justice, at i (2004), http://www.brennancenter.org/sites/default/files/legacy/d/RV4_AccuracyCounts.pdf (last visited Sept. 24, 2015).

disenfranchisement due to incarceration or parole status.[31]

The people of New York State have already recognized that erasing tens of thousands of incarcerated individuals from their home districts distorts our system of democracy and impermissibly dilutes the political power of communities most affected by state and local criminal justice policy decisions. In 2010, New York State enacted legislation, supported by a majority of the State's voters,[32] mandating that incarcerated persons be counted as residents of their home communities, rather than their places of incarceration, for the purpose of legislative apportionment at the state and local levels. *See* N.Y. Corr. Law § 71(8). Then-State Senator Eric Schneiderman, the bill's sponsor, expressed concern that excluding incarcerated individuals from the population counts of their home communities was creating "electoral inequities" and "leading to vote

---

[31] U.S. Census Bureau, 2010 Census Public Law File Prisoner Adjusted LATFOR Population.

[32] Quinnipiac University Release Detail, *New York Voters Back Fracking, Despite Concerns, Quinnipiac University Poll Finds; More Women in Government Means Fewer Sex Scandals*, Quinnipiac Univ. (Aug. 11, 2011) (noting that sixty percent of voters say that prison inmates should be counted as residents in their home districts), http://www.quinnipiac.edu/news-and-events/quinnipiac-university-poll/new-york-state/release-detail?ReleaseID=1635.

dilution for urban communities of color across the state," largely due to the fact that over seventy-five percent of the people in New York State prisons are people of color and over seventy percent are from urban communities. *See* Sponsor's Memo, *reprinted in* Bill Jacket for Ch. 57 (2010). Thus, as New York State's elected representatives have already recognized, apportionment using a total population count that includes disenfranchised parolees and incarcerated residents is vital to New York City's ability to most effectively serve the needs of some of its most vulnerable communities.

II. This Court Should Adhere to Its Longstanding Precedent Given the Extensive Reliance on *Reynolds* by New York City and Other Local Governments.

In addition to its flaws as a matter of law and policy, adoption of a new constitutional standard would be deeply disruptive for many states and local governments. Such a change would require governmental bodies across the country to jettison their long-used systems of apportionment, which have been shown to be workable, fair, and effective, in favor of a new and unproven approach. The total population rule articulated in *Reynolds* has been the law for more than 50 years, and this Court should not disturb it. Principles of *stare decisis* apply with special force here, because states and local governments have structured their districting practices in extensive reliance on this Court's

precedent. *Bush v. Vera*, 517 U.S. 952, 985-86 (1996) (plurality op.); *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 202-03 (1991). Even in constitutional cases, this Court has always required "special justification" for overruling settled precedent. *See, e.g., United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843, 856 (1996).

The reliance interests here run broadly and deeply. and those interests are significant because use of total population has allowed cities like New York to refine their apportionment practices over time to ensure inclusive representation for all residents. For example, guided by *Reynolds* and following decisions, New York has overhauled its redistricting practices on two major occasions to comport with this Court's holdings. On the same day that *Reynolds* was decided, this Court struck down the apportionment formulas of New York State, holding that they applied a form of geographical discrimination that violated the equal protection guarantee of "one person, one vote." *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964). So, the State re-examined its apportionment scheme, and, in 1969, the people of New York voted to amend the constitution to include "aliens" in the apportionment base and adopt apportionment formulas based on total population. N.Y. Const. art. III, § 5-a; *see also* 1964 Report of the Citizens' Committee on Reapportionment (noting the governor's announcement to revise the state's apportionment plan as expeditiously as possible in

response to the *WMCA, Inc. v. Lomenzo* decision); 1968 Senate Debate Transcripts, p. 1923-24 (noting the cost-effective and practical benefits of using total population figures for apportionment).

More than two decades later, New York City overhauled its districting procedures when this Court struck down its practice of applying "one vote" to each borough for electing some of the representatives of the Board of Estimate—the former governing entity responsible for budget and land-use decisions in the City. *Bd. of Estimate v. Morris*, 489 U.S. 688 (1989). In response to this Court's decision and after a voter referendum, New York City revised its Charter, abolished the Board of Estimate, and restructured the shape of City government by redistributing the Board's power primarily to the City Council and Mayor.[33]

Overturning this Court's longstanding precedent would force New York City to amend its Charter and the State to amend its constitution to restructure districting practices yet again. Moreover, in New York City, the decision to use total population warrants further deference by this Court because it was based on the people's vote. *See*

---

[33] Alan Finder, *The 1989 Elections: Overhaul of New York City Charter Is Approved, Polls Show*, N.Y. Times (Nov. 8, 1989), *available at* http://www.nytimes.com/1989/11/08/nyregion/1989-elections-charter-overhaul-new-york-city-charter-approved-polls-show.html.

Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1637 (2014) (reaffirming the value of democratic decision-making based on the people's vote).

New York City has also repeatedly relied on the United States Department of Justice's approval of the City's plans for City Council districting and other voting changes, including preclearance of the New York City Charter provisions that require apportionment by total population. In 1971, three of the City's five boroughs were declared covered jurisdictions under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973b, and remained covered jurisdictions until this Court's decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). *See* 36 Fed. Reg. 5809 (Mar. 27, 1971). Under Section 5, the City was required to obtain pre-clearance from the federal government before implementing changes affecting voting in any of its three covered boroughs.

Over four decades, the Department of Justice approved more than 2,000 proposed voting procedures,[34] including preclearance in 1989 of the New York City Charter provisions that articulate

---

[34] *See Voting Rights Act: Evidence of Continued Need: Hearing before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 1840 (2006) (Appendix to the statement of Wade Henderson, report of RenewTheVRA.org, "Voting Rights in New York, 1982-2006," at 4).

the procedures and schedules for preparing City Council districting plans.[35] These Charter provisions require roughly equal numbers of total residents per district, with total population deviations of less than ten percent across all districts. *See* N.Y.C. Charter § 52(1)(a). The provisions further require districting plans to be established in a manner that ensures "the fair and effective representation" of "racial and language minority groups" and "keep[s] intact neighborhoods and communities with established ties of common interest and association, whether historical, racial, economic, ethnic, religious, or other." *See* N.Y.C. Charter § 52(1)(b) and (c). New York City's experience confirms that the total population standard works and advances the interests of inclusion and diversity and representation for all residents and neighborhoods.

Given the critical values at stake, other cities include similar criteria in their charters and voting

---

[35] *See* N.Y.C. Districting Comm'n, *Submission for Preclearance of the Final Districting Plan for the Council of the City of New York* (Mar. 22, 2013), at 7-9.

laws.[36] Because considerations such as ensuring the representation of minorities and keeping neighborhoods intact are naturally related to people, not voters, New York City and other localities would be unable to fulfill these important mandates if they were required to draw districts based on voting population.

Moreover, as a practical matter, use of total population is the only workable method of districting for city elective positions such as City Council positions, especially given the relatively small size of the districts at issue. As other amici have discussed, the current data on citizenship numbers, which comes from the American Community Survey, is not appropriate for drawing district lines because it is only based on 2.5 percent of American households.[37] This Court should therefore adhere to its prior precedent and continue

---

[36] *See, e.g.*, Chi. Mun. Code § 2-8-300 (allowing district lines to respect "established communities of interest"); San Diego Charter § 5.1 (directing the redistricting commission to "preserve identifiable communities of interest"); S.F. Charter § 13.110(d) (allowing slight population variations "to prevent dividing or diluting the voting power of minorities and/or to keep recognized neighborhoods intact"); Wichita Charter Ordinance No. 173 (requiring district lines to "maintain, as much as possible, the integrity of broadly cohesive areas of interest").

[37] Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755, 757 (2011).

to allow the use of Census figures related to total population in the apportionment task.

One final point bears mention. While appellants and amici dispute the burdens of reversing decades of precedent, at least one factor is undisputed. The constitutional regime that appellants seek to install is untested. The vast majority of local governments throughout the nation have no experience with districting based on "total voting population." While cities have managed to sustain thriving, diverse, and growing populations by ensuring that all residents are represented in their legislative bodies, the feasibility, risks, and repercussions of compelling cities to abandon decades of practice are unknown. Overturning the total population benchmark would compel almost every local government in the nation to embark on a political experiment of vast dimensions at fundamental odds with the longstanding and reasonable goal of protecting and investing in all residents.

By contrast, decades of experience have demonstrated that apportionment by total population is an effective, practical, and fair method of drawing voting districts. This carefully considered system is a critical element of New York City's commitment to treating its residents equally and ensuring that all residents have access to a local democracy that is fully responsive to their needs. Accordingly, New York City joins localities and states across the country in urging the

Supreme Court to affirm this longstanding and proven system of apportionment.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

ZACHARY W CARTER
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov
Counsel for Amicus Curiae

RICHARD DEARING*
CECELIA CHANG
KATHY PARK
CELIA RHOADS

*Counsel of Record

No. 14-940

Supreme Court, U.S.
FILED
SEP 25 2015
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

SUE EVENWEL, *et al.*,
Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF OF NATHANIEL PERSILY, BERNARD GROFMAN, STEPHEN ANSOLABEHERE, CHARLES STEWART III, AND BRUCE E. CAIN AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

NATHANIEL PERSILY
Counsel of Record
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305
(917) 570-3223
(npersily@law.stanford.edu)
Counsel for Amici Curiae

September 25, 2015

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. NO DATABASE CURRENTLY EXISTS THAT WOULD ENABLE STATES TO REDISTRICT ON THE BASIS OF EQUAL NUMBERS OF ELIGIBLE VOTERS 6

II. SURVEY DATA CONCERNING CITIZENSHIP ARE INAPPROPRIATE AS THE POPULATION BASIS FOR DETERMINING COMPLIANCE WITH ONE PERSON, ONE VOTE 11

A. **Yearly Estimates of the Citizen Voting Age Population from the American Community Survey Cannot Be Used To Establish Redistricting Plans That Comply with One Person, One Vote** 14

B. **Five-Year Averages of ACS CVAP Data Are Too Old To Serve As the Population Basis for Determining Compliance with One Person, One Vote** 16

C. **The Margins of Error for ACS CVAP Data Create Novel Problems for Assessing**

TABLE OF CONTENTS – Continued

Page

Compliance with One Person, One Vote 17

D. **The Granularity of the Census Enumeration Makes It Superior to Five-Year Averages of ACS CVAP Data As a Population Basis for Redistricting** 21

E. **The Use of CVAP Data in Litigation Under the Voting Rights Act Does Not Demonstrate Its Appropriateness As the Standard for Determining Compliance with One Person, One Vote** 24

III. VOTER REGISTRATION DATA ARE TOO VARIABLE AND OPEN TO MANIPULATION TO BE MANDATED AS THE CONSTITUTIONAL STANDARD FOR ONE PERSON, ONE VOTE 28

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Intertribal Council of Arizona, Inc., 133 S. Ct. 2247 (2013) 29

Bartlett v. Strickland, 556 U.S. 1 (2009)..... 26

Brown v. Thompson, 462 U.S. 835 (1983)..... 20

Burns v. Richardson, 384 U.S. 73 (1966).....28, 29

Department of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999) 33

Ellis v. Mayor & City Council of Baltimore, 352 F.2d 123 (4th Cir. 1965) 29

Favors v. Cuomo, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012)..... 2

Flateau v. Anderson, 537 F. Supp. 257 (S.D.N.Y. 1982)..... 2

In re Legislative Redistricting of the State, 805 A.2d 292 (Md. 2002) 2

In re Reapportionment Commission, 36 A.3d 661 (Conn. 2012)..... 2

Larios v. Cox, 314 F Supp. 2d 1357 (N.D. Ga. 2004)..... 2, 21

League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006) 26

Navajo Nation v. Arizona Independent Redistricting Commission, 230 F. Supp. 2d 998 (D. Ariz. 2002)..... 3

Rodriguez v. Pataki, 2002 WL 1058054 (S.D.N.Y. May 24, 2002)..... 2

TABLE OF AUTHORITIES – Continued

Page

Shelby County v. Holder, 133 S.Ct. 2612 (2013)..... 25

Thornburg v. Gingles, 478 U.S. 30 (1986)..... 26

Utah v. Evans, 536 U.S. 452 (2002) 19

Voinovich v. Quilter, 507 U.S. 146 (1993)..... 20

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 2 ..... 3, 7

U.S. Const. amend. XIV..... 3, 7

STATUTES

52 U.S.C. §§ 10301, 10304 24

52 U.S.C. §§ 20501-20511.....29, 31

LEGISLATIVE MATERIALS

S. Rep. No. 97-417 (1982) 26

OTHER

Carson, E. Ann, *Bureau of Justice Statistics, Prisoners in 2013* (2014), *available at* www.bjs.gov/content/pub/pdf/p13.pdf..... 8

Demos, *Same-Day Registration* (2014), *available at* http://www.demos.org/sites/default/files/publications/SameDayRegistration-2015.pdf 31

TABLE OF AUTHORITIES – Continued

Page

Federal Judicial Center, *Reference Manual on Scientific Evidence* (2000) 18

Grofman, Bernard, *Expert Witness Testimony and the Evolution of Voting Rights Case Law, in Controversies in Minority Voting: The Voting Rights Act in Perspective* (Bernard Grofman & Chandler Davidson, Eds., 1992)..... 25

Hasen, Richard L., *The Voting Wars: From Florida 2000 to the Next Election Meltdown* (2012) 29

Katz, Ellen, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* (2005)..... 26

McDonald, Michael, *2008 General Election, available at* https:// docs. google. com/ spreasheets/d/1deCSqgLqrzFgpUa_S8Gk8 mKrPq47pkx1eqKwZGtSqA/edit#gid=1424 011440..... 9

McDonald, Michael, *The 2010 Election: Signs and Portents for Redistricting*, 44 PS: Pol. Sci. & Pol. 311 (2011) 9

McDonald, Michael, *Redistricting Developments of the Last Decade—and What's on the Table in This One*, 10 Election L. J. 313 (2011). 9

McDonald, Michael, *The True Electorate: A Cross-Validation of Voter File and Election Poll Demographics*, 71 Pub. Op. Q. 588 (2007) 9

TABLE OF AUTHORITIES – Continued

Page

McDonald, Michael, *The Turnout Rate Among Eligible Voters for U.S. States, 1980-2000*, 2 State Pol. & Pol'y Q. 199 (2002) 9

McDonald, Michael, *United States Election Project: How is the overseas eligible population estimated?, available at* http://www.electproject.org/home/voterturnout/faq/overseas 9

McDonald, Michael & Samuel Popkin, *The Myth of the Vanishing Voter*, 95 Am. Pol. Sci. Rev. 963 (2001) 10

National Conference of State Legislatures, *2010 Constituents Per State Legislative District Table, available at* http://www.ncsl.org/research/about-state-legislatures/2010-constituents-per-state-legislative-district.aspx 14

National Conference of State Legislatures, *Same Day Voter Registration* (2015), *available at* http://www.ncsl.org/research/ elections-and-campaigns/same-day-registration.aspx 31

Persily, Nathaniel, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755 (2011) 24, 33

Pintor, Rafael Lopez & Maria Gratschew, *Voter Turnout Since 1945: A Global Report* (2002) 30

Presidential Commission on Election, *The American Voting Experience: Report and*

TABLE OF AUTHORITIES – Continued

Page

Recommendations of the Presidential Commission on Election Administration (2014), *available at* https://www.supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf 30

Rampell, Catherine, *The Beginning of the End of the Census?*, N.Y. Times (May 19, 2012), http://www.nytimes.com/2012/05/20/ sunday-review/ the-debate-over-the-american-community-survey.html 11

Squire, Peverill, Raymond E. Wolfinger & David P. Glass, *Residential Mobility and Voter Turnout*, 81 Amer. Pol. Sci. Rev. 45 (1987) 30

Taylor, Steven et al., *A Different Democracy: American Government in Thirty-One Country Perspective* (2014) 30

Uggen, Christopher, Sarah Shannon, & Jeff Manza, The Sentencing Project, *State Level Estimates of Felon Disenfranchisement in the United States, 2010* (2012), *available at* http:// sentencingproject.org/ doc/ publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf 8

U.S. Census Bureau, *2010 Census Redistricting Data (Public Law 94-171) Summary File: Technical Documentation* (2011), *available at* https://www.census.gov/prod/cen2010/doc/pl94-171.pdf 6

TABLE OF AUTHORITIES – Continued

Page

U.S. Census Bureau, *American Community Survey, available at* http://www.census.gov/ programs-surveys/acs/ 13

U.S. Census Bureau, *American Community Survey: 2010 Release Schedule, available at* http://www.census.gov/programs-surveys/acs/news/data-releases/2010 /release-schedule.html.....14, 15, 16

U.S. Census Bureau, *American Community Survey: Item Allocation Rates, available at* http://www.census.gov/acs/www /methodology/sample-size-and-data-quality/item-allocation-rates/#note1..... 19

U.S. Census Bureau, *American Community Survey: Item Allocation Rates Definitions, available at* http://www.census.gov/ programs-surveys/acs/methodology/sample-size-and-data-quality/item-allocation-rates-definitions.html. 19

U.S. Census Bureau, *American Community Survey: Multiyear Accuracy of the Data* (2014), *available at* http://www2.census.gov/programssuveys/acs/techdocs/accuracy/ MultiyearACSAccuracyofData2013.pdf 17, 18

U.S. Census Bureau, *American Community Survey: Response Rates, available at* http://www.census.gov/acs/www/methodology/sample-size-and-data-quality/response-rates/ 11, 12

U.S. Census Bureau, *American Community Survey: Sample Size Definitions, available at* https://www.census.gov/ programs-

TABLE OF AUTHORITIES – Continued

Page

surveys/acs/methodology/sample-size-and-data-quality/sample-size-definitions.html 18

U.S. Census Bureau, *Census Bureau Statement on American Community Survey 3-Year Statistical Product* (2015), *available at* http://content.govdeliery.com/accounts/USCENSUS /bulletins/eeb4af 13, 15

U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know* (2008), *available at* https://www.census.gov/content/dam/Census/library/publications/2009/acs/ACSAIANHandbook.pdf 12, 13

U.S. Census Bureau, *Congressional Apportionment, Who's Counted, available at* http:// www. census.gov/population/ apportionment/about/who.html 9

U.S. Census Bureau, *Explore the Form: One of the Shortest Forms in History – 10 Questions in 10 Minutes, available at* http://www.census.gov/2010census/about/interactive-form.php 7

U.S. Census Bureau, *How Do We Know? An American Community, available at* https://www.census.gov/library/infographics/acs_community.html 24

U.S. Census Bureau, *How We Count America, available at* http://www.census.gov/2010census/about/how-we-count.php 7

TABLE OF AUTHORITIES – Continued

Page

U.S. Census Bureau, *Redistricting Data: Voting Age Population by Citizenship and Race (CVAP), available at* http://www.census.gov /rdo/data/voting_age_population_by_citizenship_and_race_cvap.html 20, 22

U.S. Census Bureau, *Standard Hierarchy of Census Geographic Entities, available at* http://www2.census.gov/geo/pdfs/reference/geodiagram.pdf 23

U.S. Census Bureau, *Table 3. Overseas Population of the 50 States and the District of Columbia: 2010 Census* (2010), *available at* https:// www.census.gov /population/ apportioment/files/Overseas%20Population %202010.pdf..... 9

U.S. Census Bureau, *Voting and Registration: Historical Time Series Tables, available at* http://www.census.gov/hhes/www/socdemo /voting/publications/historical/index.html..... 29

INTEREST OF *AMICI CURIAE*[1]

Amici are political scientists who are experts on redistricting, survey research, and the census. *Amici* submit this brief to highlight the data challenges involved in redistricting on any basis other than the official census enumeration. *Amici* agree with Appellees' substantive argument that the Constitution does not prevent the use of total population as the population basis for redistricting. States, at a minimum, have the constitutional latitude to redistrict on the basis of the only dataset that is sanctioned by the Constitution. To change the constitutional rules that have long determined one person, one vote would, moreover, be incredibly disruptive to the redistricting process and force courts to engage with a series of questions concerning the reliability of sample surveys and related datasets. In particular, *amici* submit this brief to bring to the Court's attention the absence of any dataset that would enable states to redistrict on the basis eligible voters.

Nathaniel Persily is the James B. McClatchy Professor of Law at Stanford Law School with appointments in both the departments of Communication and Political Science. He recently served as the nonpartisan Senior Research Director for the Presiden-

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that he authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3(a), counsel for *amici* represents that all parties have filed with the Court a blanket consent authorizing such a brief.

tial Commission on Election Administration. His CV is available at http://www.persily.com/. He has served as a special master or court-appointed expert in the following redistricting cases: *Favors v. Cuomo*, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *In re Reapportionment Commission*, 36 A.3d 661 (Conn. 2012); *Larios v. Cox*, 314 F. Supp. 2d 1357 (N.D. Ga. 2004); *In re Legislative Redistricting of the State*, 805 A.2d 292 (Md. 2002); *Rodriguez v. Pataki*, 2002 WL 1058054 (S.D.N.Y. May 24, 2002).

Bernard Grofman is Professor of Political Science at the University of California, Irvine, and holds the Jack W. Peltason Bren Foundation Endowed Chair. He is the former Director of the Center for the Study of Democracy and a fellow of the American Academy of Arts and Sciences. His CV is available at http://www.socsci.uci.edu/~bgrofman/. He served as a court-appointed expert in *Larios v. Cox*, 305 F. Supp. 2d 1335 (N.D. Ga. 2004); *Rodriguez v. Pataki*, 2002 WL 1058054 (S.D.N.Y. May 24, 2002); *Flateau v. Anderson*, 537 F. Supp. 257 (S.D.N.Y. 1982).

Stephen Ansolabehere is Professor of Government at Harvard University. He directed the Caltech/MIT Voting Technology Project from its founding in 2000 through 2004 and is the principal investigator of the Cooperative Congressional Election Study, a collaborative effort of over 60 universities and colleges in the United States. He is a member of the Board of Overseers of the American National Election Study and the Reuters Institute of Journalism at Oxford University, and is a Fellow of the American Academy of Arts and Sciences. He has served as an expert witness in a number of redistricting cases. His biography is available at http://scholar.harvard.edu/ ansolabehere.

Charles Stewart III is the Kenan Sahin Distinguished Professor of Political Science at the Massachusetts Institute of Technology. He served as Head of the MIT Department of Political Science from 2005 to 2010 and currently directs the Caltech/MIT Voting Technology Project. He is a Fellow of the American Academy of Arts and Sciences. His CV is available at http://web.mit.edu/polisci/people/faculty/cv/stewart_cv_2013.pdf.

Bruce E. Cain is the Director of the Bill Lane Center for the American West and the Charles Louis Ducommun Professor in Humanities and Sciences, and Professor of Political Science at Stanford University. He is a Fellow of the American Academy of Arts and Sciences. His CV is available at http://west.stanford.edu/node/965. He served as a Special Master in *Navajo Nation v. Ariz. Indep. Redistricting Comm'n*, 230 F. Supp. 2d 998 (D. Ariz. 2002), and as an expert witness in numerous redistricting cases.

SUMMARY OF ARGUMENT

The United States Constitution requires the creation of a single population dataset: the decennial Census's "actual enumeration" of persons. U.S. Const. art. I, § 2; amend. XIV. As such, states and localities, almost without exception, have used this dataset to build redistricting plans, and courts have repeatedly upheld plans that do so. Neither the federal government, nor any state, maintains an address list of eligible voters that would allow for redistricting on that basis. Surveys, funded by congressional whim, that provide partial estimates of eligibility based on citizenship are a poor substitute for the census redistricting dataset. An interpretation of

the Fourteenth Amendment that would prohibit the use of the most accurate and only constitutionally mandated population dataset and, in effect, mandate the creation of some new count of eligible voters would be both unprecedented and incredibly destabilizing to the U.S. Census and redistricting process.

The contested philosophical arguments occupying most of the briefing in this case can be avoided in favor of a simpler resolution based on the type of population data available and usable for redistricting. Appellants' interpretation of the constitutional requirement of one person, one vote is radical not only in its theoretical underpinnings, but also in its real, practical implications for the redistricting process. They argue that the dataset all states used for redistricting in 2010 is constitutionally deficient and impermissible. Instead, some other data – perhaps the American Community Survey, registered voter statistics, or some heretofore nonexistent dataset of eligible voters – should be used as the population basis for redistricting. None of these datasets, however, have the granularity, timeliness, detail, or accuracy comparable to the census enumeration.

Appellants' constitutional argument is predicated on the notion that it is possible to draw districts around equal numbers of eligible voters. If the Fourteenth Amendment requires that only people who can vote should be equally represented, then redistricting, under this view, should be based on equal numbers of eligible voters and no one else. For most states, that means the census enumeration of the total population, plus voting eligible military and overseas voters not counted at their voting address in the census, minus children, noncitizens, prisoners and disenfranchised felons, and those ineligible because

of mental disability. No state maintains a dataset of eligible voters, as such.

Appellants, therefore, urge this Court to mandate, as a constitutional rule, the use of currently available second-best alternatives that would not satisfy the rigid legal standard they proffer. Estimates of the citizen voting age population (CVAP) derived from the yearly American Community Survey (ACS) of 2.5 percent of households do not provide current, accurate data at the levels of geography (census block level or precinct) where most redistricting is conducted. At best, the ACS five-year averages give ballpark estimates of previous citizenship rates, several years before redistricting is conducted. The ACS could also be eliminated by the government at any time, as the House of Representatives has voted to do, or fully or partially defunded, as has happened twice since its inception.

Registered voter lists invite a different set of problems, and can only be used for redistricting if they match up well with more reliable population statistics. They are ripe for political manipulation and highly variable depending on the temporal proximity of the list to a given election. Moreover, at least one state does not keep a voter registration list, and another dozen allow for Election Day registration, which can lead to substantial changes in voter registration data in a short period of time.

The one-person, one-vote rule is not broken, and this Court should not try to fix it. The collateral damage caused by a rejection of the census as the basis for redistricting cannot be easily contained. In the end, Appellants not only invite the Court to read the Constitution to prohibit what is now the near-universal use of census population data for redistrict-

ing, but they also suggest that the Fourteenth Amendment requires government collection of data on voter eligibility that heretofore has not existed. The Court should reject that invitation.

ARGUMENT

I. NO DATABASE CURRENTLY EXISTS THAT WOULD ENABLE STATES TO REDISTRICT ON THE BASIS OF EQUAL NUMBERS OF ELIGIBLE VOTERS.

Appellants describe the key issue in this case as "whether the one-person, one-vote rule protects the right of eligible voters to an equal vote." App. Br. at 14. Yet, nowhere in the briefing before this Court or the litigation below has anyone identified a dataset that presents the eligible voting population of Texas communities in a way that would allow for redistricting on that basis. Texas is not unique in this regard: No state keeps track of its eligible voter population, let alone in a dataset usable for redistricting.

The absence of an eligible voter dataset should not surprise anyone familiar with the census and redistricting process in the United States. Virtually all states and localities draw districts based on the Census Redistricting Dataset – the P.L. 94-171 datafile distributed within one year of the decennial census to each state in time for its redistricting. *See* U.S. Census Bureau, *2010 Census Redistricting Data (Public Law 94-171) Summary File: Technical Documentation* (2011), *available at* https://www.census.gov/prod/cen2010/doc/pl94-171.pdf. The Census Redistricting Datafile is derived from the "short form" of the cen-

sus, distributed to all U.S. households every ten years in fulfillment of the Constitution's requirement of an "actual enumeration." U.S. Const. art. I, § 2; amend. XIV. The short form includes ten questions concerning the respondent's name, phone number, age, gender, and race, as well as whether the residence is owned or rented. *See* U.S. Census Bureau, *Explore the Form: One of the Shortest Forms in History – 10 Questions in 10 Minutes, available at* http://www .census.gov/2010census/about/interactive-form.php. It contains no questions regarding citizenship or other criteria of voter eligibility except for age.

The Census Redistricting Datafile is both over and under-inclusive of the voting-eligible population. The datafile includes an enumeration of the voting age population, by providing population statistics for all those over the age of 18. But those counts, like those of the total population, include a myriad of groups ineligible to vote. Not only are non-citizens included in the redistricting data, but so are prisoners and disenfranchised felons, and those disenfranchised because of mental disability. Moreover, the redistricting dataset excludes a large group of voters (military and overseas voters) who are not at a residence on Census Day, but are nevertheless eligible to vote in elections.[2]

---

[2] Because the census operates under the "usual residence rule," it counts every person at the location where they "live or sleep most of the time" as of Census Day. *See* U.S. Census Bureau, *How We Count America, available at* http://www.census.gov/2010census/about/how-we-count.php. Prisoners are therefore counted in prison.

These problems of over and under-inclusion are not unique to the Census Redistricting Dataset. The American Community Survey citizenship estimates, blessed by Appellants and described in greater detail below, also include prisoners, disenfranchised felons, and those ineligible because of mental disability, and exclude most eligible overseas and military voters. These are not nit-picky statistical arguments. The differences between the allegedly ideal, constitutionally mandatory statistic of eligible voters and the available datasets Appellants rely upon are considerable.

Data from Texas demonstrate the impossibility of satisfying Appellants' constitutional standard. Even if the estimates of the citizen voting age population (CVAP) were accurate, they would still erroneously include the 168,280 Texans in prison (which itself exceeds the population of a Texas legislative district), and the more than 350,000 others who are disenfranchised because of a felony conviction. *See* E. Ann Carson, *Bureau of Justice Statistics, Prisoners in 2013* 3 (2014), *available at* www.bjs.gov/ content/pub/pdf/p13.pdf; Christopher Uggen, Sarah Shannon, & Jeff Manza, The Sentencing Project, State Level Estimates of Felon *Disenfranchisement in the United States, 2010*, 16 (2012), *available at* http://sentencingproject.org/doc/publications/fd_State _Level_Estimates_of_Felon_Disen_2010.pdf.

CVAP statistics not only include ineligible voters, they also exclude eligible ones, such as U.S. citizens living abroad. Although we do not know with specificity the number of eligible overseas and military voters, the counts used for apportionment of seats in the U.S. House of Representatives (as compared to

the PL 94-171 datafile) include overseas U.S. military and federal civilian employees and their dependents. *See* U.S. Census Bureau, *Congressional Apportionment, Who's Counted, available at* http://www.census.gov/population/apportionment/about/who.html. For Texas, the 2010 Census counted 122,857 overseas military and federal employees and their dependents. U.S. Census Bureau, *Table 3. Overseas Population of the 50 States and the District of Columbia: 2010 Census* (2010), *available at* https://www.census.gov/population/apportioment/files/Overseas%20Population%202010.pdf. But that estimate includes children and excludes several hundred thousand overseas voters who do not work for the government, but are nevertheless eligible to vote. For the 2008 Election, Professor Michael McDonald of the University of Florida, the foremost expert on the differences between the voting eligible population and the voting age population, estimated the size of the overseas voting eligible population for Texas to be 549,216, constituting 3.79% of the state's eligible voter population. *See* Michael McDonald, *United States Election Project: How is the overseas eligible population estimated?, available at* http://www.electproject.org/home/voterturnout/faq/overseas; Michael McDonald, *2008 General Election, available at* https://docs.google.com/spreadsheets/d/1deCSqgLqrzFgpUa_S8Gk8mKrPq47pkx1eqKwZGtSqA/edit#gid=1424011440; *see also* Michael McDonald, *The 2010 Election: Signs and Portents for Redistricting*, 44 PS: Pol. Sci. & Pol. 311 (2011); Michael McDonald, *Redistricting Developments of the Last Decade—and What's on the Table in This One*, 10 Election L. J. 313 (2011); Michael McDonald, *The True Electorate: A Cross-Validation of Voter File and Election Poll Demographics*, 71 Pub. Op. Q. 588 (2007); Michael

McDonald, *The Turnout Rate Among Eligible Voters for U.S. States, 1980-2000*, 2 State Pol. & Pol'y Q. 199 (2002); Michael McDonald & Samuel Popkin, *The Myth of the Vanishing Voter*, 95 Am. Pol. Sci. Rev. 963 (2001).

Despite the best efforts of political scientists and data analysts, these partial estimates of the voting eligible population remain ballpark figures, at best, and are available, if at all, at the state level. None are available in a format or at a level of geography that could be used for redistricting. No state can identify with precision the number of eligible voters in particular neighborhoods, let alone census blocks or precincts used to build redistricting plans. As the Texas data demonstrate, these discrepancies between the eligible voter population in the state and any available redistricting data (even those relied on by Appellants) can be quite large: differences amounting to several million people. Therefore, Appellants' argument that the Constitution requires redistricting on the basis of equal numbers of eligible voters necessarily implies a new and radical constitutional mandate that forces the government to collect heretofore unavailable information about the eligibility and location of any potential voter. Under current circumstances, Appellants' constitutional standard simply cannot be satisfied.

II. SURVEY DATA CONCERNING CITIZENSHIP ARE INAPPROPRIATE AS THE POPULATION BASIS FOR DETERMINING COMPLIANCE WITH ONE PERSON, ONE VOTE.

Appellants and *amici* rely on citizenship data derived from the American Community Survey (ACS) as a second-best attempt to approximate the eligible voter population. As noted above, such data do not come close to representing the eligible voter population. ACS data have additional shortcomings as the population standard for one person, one vote, however. The ACS is a very valuable and important survey, but it is not a census. It is not mandated by the Constitution and could be eliminated at any time. In fact, the House of Representatives has previously voted to end it, and due to the government shutdown in 2013 and a reduction in funding in 2004, the survey suffered from low response rates.[3]

---

[3] *See* Catherine Rampell, *The Beginning of the End of the Census?*, N.Y. Times (May 19, 2012), http://www.nytimes.com/2012/05/20/sunday-review/the-debate-over-the-american-community-survey.html (noting the vote in Congress and quoting Representative Daniel Webster as saying "We're spending $70 per person to fill this out. That's just not cost effective."); U.S. Census Bureau, *American Community Survey: Response Rates, available at* http://www.census.gov/acs/www/ methodology/sample-size-and-data-quality/response-rates/ (noting a 7.4 percentage point drop in the response rate from the previous year and explaining "[a]s a result of the 2013 government shutdown, the ACS did not have a second mailing, a telephone followup, or a person followup operation for the October 2013 housing unit panel."); *see also id.* ("Similarly, due to a reduction in funding in 2004, the telephone and personal visit followup

The ACS, while revolutionary and essential as a tool to inform public policy, is not designed to produce districts that conform to constitutional requirements. Its yearly estimates of the citizen voting age population (CVAP) come with an impermissibly high margin of error to serve as the standard for one person, one vote. If used as the touchstone for judging malapportionment, five-year averages of yearly ACS surveys would lead to districts based on stale data that are half a redistricting-cycle old. In short, even if one were to ignore the mismatch between the ACS data and the eligible voter population, requiring that districts be drawn on the basis of survey results introduces new errors and controversies into the redistricting process.

Virtually all data concerning the current rates of citizenship of the U.S. population come from the American Community Survey. The ACS draws from a sample of approximately 2.5 percent of American households, derived from rolling surveys of roughly 295,000 people per month throughout the year. The Census Bureau publishes yearly estimates of the relevant survey items, as well as three and five year averages of those items, along with accompanying margins of error. U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know* 3 (2008), *available at* https://www.census.gov/content/dam/Census/library/publications/2009/acs/ACSAIANHandbook.pdf. However, highlighting the uncertain future of the ACS, the Census Bureau it-

---

operations for the January 2004 panel were dropped, which resulted in a comparable effect on the overall 2004 response rate."). The response rate for Texas in 2013 was 88.4 percent. *See id.*

self has now even proposed eliminating the three-year averages of the ACS due to "tight budgetary considerations."[4]

The ACS is not a survey primarily concerned with issues related to citizenship, let alone the redistricting process. It replaced what was known as the census "long form," which had been given to one out of every six Americans at the time of the decennial census. The ACS provides information concerning all matter of population and housing characteristics. The survey asks questions on everything from a house's plumbing, heating fuel, internet connectivity, and tax rates, to its occupants' citizenship, marital, employment, and veteran status. *See* U.S. Census Bureau, *American Community Survey, available at* http://www.census.gov/programs-surveys/acs/. "The ACS puts this up-to-date information about important social issues at the fingertips of people who need it, including policymakers, researchers, businesses and nongovernmental organizations, journalists, teachers, students, and the public." U.S. Census Bureau, *A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know*, at 2.

The American Community Survey does not provide reliable, up-to-date estimates of the citizen voting age population (CVAP) at the level of granularity most appropriate for redistricting at lower levels of geography. The data released in time for redistricting are derived from data half a census cycle old or

---

[4] U.S. Census Bureau, *Census Bureau Statement on American Community Survey 3-Year Statistical Product* (2015), *available at* http://content.govdelivery.com/accounts/USCEN-SUS/ bulletins/eeb4af

released at too high a level of geography to be useful. Requiring redistricting based on ACS CVAP will introduce new types of errors into the redistricting process and create great uncertainty as to the appropriate benchmarks for evaluating compliance with one-person, one-vote.

A. Yearly Estimates of the Citizen Voting Age Population from the American Community Survey Cannot Be Used To Establish Redistricting Plans That Comply with One Person, One Vote.

No one, including Appellants or their supporting *amici*, suggests that the ACS one-year estimates would be appropriate for redistricting. *See* App. Br at 9 (presenting only five-year ACS CVAP averages). Due to the annual survey's small sample size, ACS one-year estimates are only released for census places (usually cities and towns), county subdivisions, and other levels of geography that have a total population in excess of 65,000 people. *See* U.S. Census Bureau, *American Community Survey: 2010 Release Schedule*, *available at* http://www.census.gov/programs-surveys/acs/news/data-releases/2010/release-schedule.html. Even assuming that such estimates provided accurate coverage to an entire state, one cannot patch together large population units to build redistricting plans that comply with one person, one vote. In fact, for the majority of states, districts for the lower house of the state legislature have fewer than 60,000 people. *See* Nat'l Conference of State Legislatures, *2010 Constituents Per State Legislative District Table*, *available at* http://www.ncsl.org/research/about-state-legislatures/2010-constituents-per-state-legislative-district.aspx. In other words, the released one-year

data are for levels of geography that themselves are larger than most lower house state legislative districts. The same can be said for the thousands of towns (census places) that need to redistrict, but population data from the ACS are released only for the town as a whole. (Even in the unlikely event the Census continues to provide them, the three-year averages, which are released for areas of 20,000 or more people, would be inappropriate building blocks for redistricting for the same reasons.[5])

In addition, data from the yearly ACS are not compiled and delivered in time to complete redistricting for upcoming elections for some jurisdictions. ACS estimates are released approximately nine months after the end of the survey year. For example, 2010 ACS estimates were released in September 2011. *See* U.S. Census Bureau, *American Community Survey: 2010 Release Schedule*. States, such as Virginia and New Jersey, need to redistrict well in advance of that date in order to prepare for their legislative elections that year. The ACS yearly surveys cannot be released in as timely a fashion as the decennial census, given that the survey is taken each month throughout the year, and some period must be allowed for compiling the data for the previous twelve-month period.

---

[5] *See* U.S. Census Bureau, *Census Bureau Statement on American Community Survey 3-Year Statistical Product*, ("As a result of tight budgetary considerations, the U.S. Census Bureau has proposed permanently discontinuing [the 3-year] statistical product from the American Community Survey beginning in fiscal year 2016.").

B. Five-year Averages of ACS CVAP Data Are Too Old To Serve As the Population Basis for Determining Compliance with One Person, One Vote.

Because the single-year ACS data, as well as the three-year averages, are insufficiently granular for use in redistricting, Appellants and *amici* suggest using the five-year averages of ACS data. *See* App. Br. at 9-13; Br. of Demographers Peter A. Morrison, Thomas M. Bryan, William A. Clark, Jacob S. Siegel, David A. Swanson and the Pacific Research Institute as *Amici Curiae* in Support of App., at 12-15 (hereinafter PRI Br.). Five-year averages are unfit for redistricting for similar reasons as the other data releases, but also for the added fact that the averages are not fresh enough to ensure that plans actually reflect the population at the time of redistricting.

Five-year averages, by their very nature, describe what the citizenship rate *was*, not what it *is*. Under the best of circumstances, a jurisdiction would redistrict on the basis of data, some of which is more than five years old at the time of the line-drawing. To draw districts for the 2012 elections, for example, the "best" ACS five-year averages available would have been for the period 2006-2010. *See* U.S. Census Bureau, *American Community Survey: 2010 Release Schedule* (noting release of five year ACS averages from 2006 to 2010 on December 8, 2011, which would still have been too late for states such as New Jersey and Virginia, which held state legislative elections one month prior). Unlike the decennial census, which provides a snapshot of the population at the time, averages of the rolling ACS surveys give only a

rough sense of what the population may have been, sometime in the past.

Indeed, the situation is even worse. The stated CVAP for a given geography may *never* have been accurate, even if we assume each survey was performed perfectly. An average – as opposed to a median, for example – is simply the sum of all the years' estimates, divided by the number of years. As such, significant, recent changes in the CVAP would not be accurately reflected in the multiyear averages. For this reason, the Census Bureau itself cautions against their use for such purposes: "Multiyear estimates cannot be used to say what is going on in any particular year in the period, only what the average value is over the full period." *See* U.S. Census Bureau, *American Community Survey: Multiyear Accuracy of the Data* (2014), *available at* http://www2.census.gov/programs-surveys/acs/tech_docs/accuracy/MultiyearACSAccuracyofData2013.pdf.

C. The Margins of Error for ACS CVAP Create Novel Problems for Assessing Compliance with One Person, One Vote.

Redistricting with survey data, instead of the census enumeration, necessarily invites new controversies concerning the margin of error in surveys and the related uncertainty of the population estimates for districts. Even though the one-person, one-vote rule permits departures from precise mathematical equality in district populations, never has this Court engaged with the question of the degree of uncertainty the Constitution would permit for the reported population estimates of such districts. In other words, redistricting on the basis of survey results re-

quires some new constitutional rule, not about how equal districts must be, but rather how confident courts must be that the reported estimates reflect the "true" population counts.

Uncertainty in the ACS CVAP estimates is expressed by confidence intervals and related margins of error. Margins of error are familiar to any consumer of public opinion polls – such as when a poll says "45 percent of Americans approve of the job the President is doing, plus or minus three percentage points." Ordinarily, such statements reflect the conclusion that the observer is 95 percent confident that the true value is somewhere within the margin of error – in this example, somewhere between 42 percent and 48 percent. The ninety-five percent confidence interval is the standard normally used to establish "statistical significance." *See* Federal Judicial Center, *Reference Manual on Scientific Evidence* 124, 194 (2000).

The American Community Survey provides margins of error for each estimate and states the confidence interval. The ACS releases data and error margins at the 90 percent confidence interval. *See* U.S. Census Bureau, *American Community Survey: Multiyear Accuracy of the Data*, at 11 ("All ACS published margins of error are based on a 90 percent confidence interval."); U.S. Census Bureau, *American Community Survey: Sample Size Definitions, available at* https://www.census.gov/programs-surveys/acs/methodology/sample-size-and-data-quality/sample-size-definitions.html ("You can be 90 percent confident that the interval within the margin of error from the estimate includes the true value.") The ACS should not be faulted for doing so; it simply

reflects the degree of statistical confidence the Census Bureau has in the numbers it is releasing based on the size of the sample. In other words, ten percent of the time, one should expect the CVAP estimates to be outside the stated margin of error.[6]

The size of the margins of error in the stated CVAP averages, moreover, will depend on the size of the average population of the given geography. For areas with larger numbers of people, a greater number of ACS respondents should be expected and the estimates of the average population over the time period should be more reliable. The building blocks of a dis-

---

[6] Another source of error in the CVAP estimates comes from nonresponse to the citizenship question on the ACS. When a respondent does not respond, sometimes the Census will then fill in a response based on the best guess (using standard statistical imputation techniques) as to what the citizenship of the respondent is. These errors are not insignificant. In the 2013 ACS, 5.2% of responses to the citizenship question were "allocated" by the Census because the respondent did not answer the question. *See* U.S. Census Bureau, *American Community Survey: Item Allocation Rates*, *available at* http://www.census.gov/acs/www/methodology/sample-size-and-data-quality/item-allocation-rates/#note1; *see also* U.S. Census Bureau, *American Community Survey: Item Allocation Rates Definitions*, *available at* http://www.census.gov/programs-surveys/acs/methodology/sample-size-and-data-quality/item-allocation-rates-definitions.html ("Allocation involves using statistical procedures, such as within-household or nearest neighbor matrices populated by donors, to impute for missing values."). *Cf. Utah v. Evans*, 536 U.S. 452, 506 (2002) (Thomas, J., dissenting) ("I am persuaded that much like earlier methods of estimation, hot-deck imputation—a modern statistical technique that the Census Bureau refers to as 'estimation'—is not constitutionally permissible."); *id.* at 508-09 ("Because hot-deck imputation is an estimation procedure that includes persons not 'actually' counted, its use to adjust the census for apportionment purposes runs afoul of the Constitution.").

trict will have greater margins of error than the district itself, just as districts within a city or state will have greater margins of error than the city or state itself.

As an example, consider a small city, such as Alamo, Texas, which has a large noncitizen population. The most recent ACS five-year averages suggest that the total estimated population from 2009 to 2013 was 18,660 (with a margin of error of 43), with a total estimated CVAP of 10,580 (with a margin of error of 826). *See* U.S. Census Bureau, *Redistricting Data: Voting Age Population by Citizenship and Race (CVAP), available at* http://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html. In other words, it would be accurate to say, with 90 percent confidence, that the "true" average CVAP of Alamo over that five-year period was somewhere between 11,406 and 9,754. Even if a city like Alamo were not further divided into districts, the error in the estimated CVAP is plus or minus 7.8 percentage points. Were it divided into districts, the estimated errors for the CVAP within such districts would be much greater.

Amici are incorrect to suggest that existing one-person, one-vote jurisprudence accommodates such margins of error. *See* PRI Br. at 29-31. First, as the example above suggests, for many jurisdictions, let alone the districts within them, the error margins would be well outside the presumptively constitutional range of plus or minus five percentage points. *See Brown v. Thompson*, 462 U.S. 835, 842 (1983); *Voinovich v. Quilter*, 507 U.S. 146, 160-62 (1993). Second, even if the range of CVAP estimates between districts is within those bounds, margins of error are

different than principled departures from population equality. A plan with purportedly equal CVAP districts with a five percent margin of error (based on a 90 percent confidence interval) is different than a redistricting plan with districts that depart from population equality by five percent. With redistricting based on ACS survey results, the disparity between districts represents the lack of confidence as to what the true population of the districts actually is. In the familiar situation courts confront, in contrast, the population difference between districts represents the variance from the ideal population per district. In evaluating those departures from population equality, the courts can then decide whether such departures are justified by legitimate districting principles. *See, e.g., Larios v. Cox*, 300 F. Supp.2d 1320 (N.D. Ga. 2004), *aff'd*, 542 U.S. 947 (2004). The fact that courts ordinarily allow for departures from perfect equality in order to accommodate other state interests is not a license, then, to draw districts, in which the population estimates are themselves surrounded by considerable uncertainty.

D. The Granularity of the Census Enumeration Makes It Superior to Five-Year Averages of ACS CVAP Data As a Population Basis for Redistricting.

ACS data, unlike decennial census data, are not released at the census block level. Census blocks are the smallest level of geography for which the Census releases data. Census blocks "nest" in all other levels of census geography, such as block groups, tracts, county subdivisions, and counties. Census blocks are the atoms, in other words, out of which all other data aggregations are produced. Because the ACS — even

the five year averages — rely on yearly 2.5 percent samples of the population, the Census Bureau does not release citizenship estimates at the census block level.

Amici casually assert that redistricting plans could, instead, be built from data at the census block group level. *See* PRI Br. at 23-26. Because the Census releases five-year ACS CVAP averages for block groups, *amici* argue that one need only aggregate these block groups together to form districts. Several problems occur, however, when one attempts to do so.

First, as with the single-year ACS data, many block groups are too large to serve as effective building blocks for redistricting plans. ACS CVAP data from Texas illustrate the point. Fort Bend County has two block groups, in which the estimated CVAP was 19,300 and 14,030. *See* U.S. Census Bureau, *Redistricting Data: Voting Age Population by Citizenship and Race (CVAP)* (Block Group 1, Census Tract 6729, Fort Bend County, Texas; and Block Group 1, Census Tract 6731.01, Fort Bend County, Texas). These block groups are at the extreme high end of the range, but hundreds more Texas block groups exist with CVAP estimates exceeding 3000 people.[7] Texas is not unique in this respect. *See id.*

Because block groups contain many more people than do blocks, it is necessarily more difficult to draw a redistricting plan that will have relatively equal districts. As with a building that needs to be certain

---

[7] *Amici* are, therefore, off the mark when they say that "a block group is a cluster of census blocks that contains between 600 and 3000 people." PRI Br. at 12.

dimensions, it will always be easier to achieve a desired configuration if the bricks one can choose are relatively small, rather than ones that are relatively large. Districting for local bodies or small state legislative districts might be impossible with such data as inputs. Even when it is possible to draw plans (such as for larger state legislative districts) with roughly equal estimated CVAP, all other legitimate redistricting goals would become more difficult to achieve.

One such goal is respect for precincts. Census block groups do not "nest" in voter tabulation districts (the census geography that usually refers to precincts). *See* U.S. Census Bureau, *Standard Hierarchy of Census Geographic Entities, available at* http://www2.census.gov/geo/pdfs/reference/geodiagram.pdf. To be sure, some states (such as Texas) ignore precinct lines when they redistrict, while others pay great attention to them. But when the geographic layer used for redistricting does not nest within precincts, districts will be more likely to cross more precincts, requiring that precinct boundaries be redrawn following the redistricting.

This particular critique is indicative of the larger problem of drawing districts with large population building blocks. The "chunkier" the building blocks for redistricting plans, the more difficult it will be to accommodate any number of other redistricting concerns while also complying with one person, one vote. Whenever block groups cross the geographic boundary of some community, the data constraints imposed by the choice to use the ACS will take precedence over those other concerns.

Of course, one could use different statistical techniques to break block groups into their component

blocks. *See* PRI Br. at 27 n. 29 (describing "raking" process"). In doing so, however, one must make certain assumptions about the distribution of the citizen population within the block group among its component blocks. Doing so introduces further error into the CVAP estimates and the resulting districts. Indeed, were this process free of error, the Census Bureau would release averaged CVAP data at the block level.

E. The Use of CVAP Data in Litigation Under the Voting Rights Act Does Not Demonstrate Its Appropriateness As the Standard for Determining Compliance with One Person, One Vote.

The ACS dataset is incredibly valuable for certain purposes, just not for redistricting in compliance with one person, one vote. As the Census promotional materials for the ACS argue, "the ACS enables decision-makers to appropriately fund school-lunch programs, place new hospitals, build new businesses and take other actions that lead to healthy towns and cities." *See* U.S. Census Bureau, *How Do We Know? An American Community*, *available at* https://www.census.gov/library/infographics/acs_community.html. One other purpose for which ACS data can be valuable is to demonstrate a violation and a potential remedy under section 2 or, previously, section 5 of the Voting Rights Act (VRA). *See* 52 U.S.C. §§ 10301, 10304; *see generally* Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 Cardozo L. Rev. 755, 776, 778-81 (2011).

The legal questions to which CVAP data provide an answer are different for VRA litigation than for mal-

apportionment cases. In both section 2 cases, and previously, section 5 enforcement actions, citizenship data are employed to demonstrate the ability of a minority community to elect its candidate of choice.[8] Those provisions require some assessment as to whether a redistricting plan is, independently, responsible for a minority group's inability to elect its preferred candidates. CVAP data can be useful in proving (or disproving) whether the minority community is large enough to elect its preferred candidates.

Section 2 redistricting litigation requires an immense amount of data from varied sources. Census population data are the starting point, but much more information is necessary for courts to assess compliance with section 2. Data regarding citizenship, voter turnout, primary and general election returns, voter registration, and any number of other sociopolitical variables concerning the community at issue will be relevant to the litigation. *See* Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law, in Controversies in Minority Voting: The Voting Rights Act in Perspective* 197 (Bernard Grofman & Chandler Davidson, Eds., 1992). In addition, to demonstrate the "Senate Factors" relating to historical discrimination in voting, section 2 litigation often features historians and political scientists as expert witnesses offering detailed examinations of the relationship of different election regulations to rates of minority political participation

---

[8] Here, we only discuss section 2 cases because the issues with section 5 enforcement actions were very similar. Moreover, following the Court's decision in *Shelby County v. Holder*, 133 S.Ct. 2612 (2013), jurisdictions no longer need to submit their redistricting plans for preclearance.

and representation. *See generally* S. Rep. No. 97-417 (1982); Ellen Katz, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982* 20-49 (2005) (assembling cases that discuss each Senate Factor).

Citizenship data can come into the litigation at different stages. Plaintiffs alleging the illegality of a redistricting plan or at-large scheme under section 2 must show that their community is (1) large enough to constitute a majority in a single member district; (2) votes cohesively; and (3) is systematically outvoted by the majority racial group, which also engages in bloc voting. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). These threshold considerations must be satisfied because, otherwise, no remedy will be available to ensure that minorities can elect their preferred candidates. If the minority group has very low rates of citizenship, then the redistricting plan is not to blame for their lack of representation. Rather, their lack of sufficient voters is. Likewise, if election returns show that the minority community does not vote together, then it is the community's lack of political cohesion, rather than the redistricting plan, that is responsible for their lack of electoral success. As with citizenship data, no one believes that the proffered data concerning previous election results constitutes a precise predictor of how a given candidate will fare in an election in a hypothetical district.

This Court has never had occasion to grapple with the statistical issues concerning the ACS CVAP data, because the Court has not considered a section 2 case since the ACS was developed. *Cf. Bartlett v. Strickland*, 556 U.S. 1 (2009); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438 (2006) (opinion of Kennedy, J.) (noting the ACS, but rejecting it be-

cause only decennial census data were presented to the District Court). The CVAP estimates for every section 2 case considered by this Court were based on results from the Census long form, distributed to one-sixth of the U.S. population at a single time along with the decennial U.S. Census. Therefore, no previous case in this Court has had to deal with the problems detailed here concerning the staleness, variability, and margins of error in the ACS data, or the small size of the ACS sample and the problems involved in averaging such data over several years.

This is not to say that the Court should disregard ACS CVAP data were it to entertain a new section 2 challenge involving a community with low rates of citizenship. Those data, constituting as they do the best and only information on citizenship rates, will be indispensable for both plaintiffs and defendants in section 2 challenges. Ballpark CVAP estimates of the style provided by the ACS will often be necessary to show that the plaintiffs' lack of electoral success is not due to widespread voter ineligibility and that a remedial districting plan is feasible. The concerns related here, however, only demonstrate the importance of not treating the ACS data as unreasonably precise. Plaintiffs' section 2 claims should not rise or fall on the basis of demonstrating, according to ACS data, that their community is exactly fifty percent plus one of a hypothetical district's CVAP. Like the many other sources of information involved in a section 2 case, ACS CVAP data should be viewed in context and considered alongside the body of information concerning the history of minority electoral success in the relevant jurisdiction.

III. VOTER REGISTRATION DATA ARE TOO VARIABLE AND OPEN TO MANIPULATION TO BE MANDATED AS THE CONSTITUTIONAL STANDARD FOR ONE PERSON, ONE VOTE.

The other second-best solution proposed as a proxy for eligible voters is registered voters. Some of the same problems regarding CVAP also arise with this alternative, such as the lack of an existing database in some states. Different problems arise as well, though, such as the dramatic yearly variability in voter registration estimates and the risk that such data would be politically manipulated.

It might appear that Appellants are on safer ground with this alternative, given that the Court, in *Burns v. Richardson*, 384 U.S. 73 (1966), considered registered voters as the redistricting basis. However, the *Burns* Court merely held that registered voters *could* be the population basis for redistricting, not that it was mandatory. Indeed, it only upheld the use of registered voters there, given the unique challenges Hawaii faced in its interim redistricting plan and the fact that registered voters served as an adequate proxy for the state's citizen population. *See id.* at 97 ("We are not to be understood as deciding that the validity of the registered voters basis as a measure has been established for all time or circumstances, in Hawaii or elsewhere."); *id.* ("[W]e hold that the present apportionment satisfies the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have re-

sulted from the use of a permissible population basis.").

The reservations the *Burns* Court expressed continue to ring true. In particular, the Court worried about political manipulation of voter registration data. *Id.* at 92-93 ("[Such data are] susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a 'ghost of prior malapportionment.'"). Those concerns have only increased since 1966, as issues of voter eligibility and access have become a political flashpoint in recent years. *See, e.g., Arizona v. Intertribal Council of Arizona, Inc.*, 133 S. Ct. 2247 (2013); *see generally* Richard L. Hasen, *The Voting Wars: From Florida 2000 to the Next Election Meltdown* (2012). Voter registration data are inherently manipulable, as states can time purges of voter databases in the run up to redistricting.[9]

Second, voter registration data vary tremendously depending on the election calendar. As the Court rightly noted, "'fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions.'" *Burns*, 384 U.S. at 93 (quoting *Ellis v. Mayor & City Council of Baltimore*, 352 F.2d 123, 130 (4th Cir. 1965)). In particular, the voter registration lists that coincide with a presidential election year will differ

---

[9] Such purges must comply with the National Voter Registration Act, 52 U.S.C. §§ 20501 – 20511, and cannot be done close to an election. Nothing prevents an otherwise legal purge, however, from being timed to coincide with a redistricting process.

dramatically from those in an off-year election. *See* U.S. Census Bureau, *Voting and Registration: Historical Time Series Tables, available at* http://www. census.gov/hhes/www/socdemo/voting/publications/ historical/index.html (presenting tables demonstrating consistently lower registration rates for congressional election years than presidential election years). Depending on the level of competitiveness of the races on the ballot, moreover, the rates of registration could vary considerably within a state in a given year, as political parties and other groups initiate registration drives in anticipation of the election.[10]

Third, voter registration lists are notoriously inaccurate. As the Report of the Presidential Commission on Election Administration, detailed, roughly eight percent (or sixteen million) voter registration records are invalid or significantly inaccurate. *See* Presidential Commission on Election Administration, *The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration* 23 (2014), *available at* https://www. supportthevoter.gov/files/2014/01/Amer-Voting-Exper-final-draft-01-09-14-508.pdf. The degree of inaccuracy varies considerably by state and over time. For some states, as many as fifteen per-

---

[10] The United States is unique in its reliance on voters to take affirmative steps to register to vote. In most countries, the government takes responsibility for registering voters. This difference in practice is responsible, some suggest, for the comparatively low voter turnout in the United States. *See* Rafael Lopez Pintor & Maria Gratschew, *Voter Turnout Since 1945: A Global Report* 23-26, 79 (2002); Steven Taylor et al., *A Different Democracy: American Government in Thirty-One Country Perspective* (2014); Peverill Squire, Raymond E. Wolfinger & David P. Glass, *Residential Mobility and Voter Turnout*, 81 Amer. Pol. Sci. Rev. 45 (1987).

cent of the names on their voter registration list constitute "deadwood": names of people who have likely moved or died since they were registered at the given address. *Id.* As a result, states conduct periodic purges of their voter rolls, as regulated by the National Voter Registration Act of 1993 (NVRA). 52 U.S.C. §§ 20501-20511. Whether a jurisdiction redistricts on the basis of a list before or after a purge can lead to different results. To guard against disenfranchisement by way of purging, furthermore, states retain different lists of voters: an active voter list of those who have regularly voted and an inactive voter list, which includes people who have missed voting in the last few elections. *See* App. Br. at 9 (presenting Texas data concerning total voter registration and "non-suspense" voter registration). As with the ACS citizenship data, mandating redistricting on the basis of "registered voters" does not settle the question concerning the proper population base for redistricting: It would require further decisions as to which voter registration list, at which time.

Finally, as with the collection of citizenship or eligible voter data, in general, the Constitution does not require voter registration or the collection of voter registration data. North Dakota, in fact, does not require voter registration, so could not redistrict on that basis. More than a dozen other states allow for Election Day registration. *See* Nat'l Conference of State Legislatures, *Same Day Voter Registration* (2015), *available at* http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx. In those states, registration statistics will vary considerably in the period before and after an election. *See* Demos, *Same-Day Registration* (2014), *available at* http://www.demos.org/sites/default/files/ publica-

tions/SameDayRegistration-2015.pdf (noting that, on average, ten percent of voters in same-day registration states register on Election Day). In such states, were voter registration the touchstone for one person, one vote, the population basis for redistricting for a given area may change a substantial amount in a single day.

CONCLUSION

Rarely can one say of a constitutional argument that it is not only wrong, but it is impossible. Such is the case here. Even if Appellants were to receive the ruling they seek, districts could not then be drawn on the basis of equal numbers of eligible voters. A national database of eligible voters does not exist and will not exist in the foreseeable future.

Second-best solutions, such as drawing districts based on available survey data concerning the citizen voting age population, do not satisfy the suggested constitutional standard. Even if a survey, like the ACS, continues to be funded in its current form, the propriety, timeliness, and accuracy of the data it produces prevent it from serving as a standard for one person, one vote. Worse still, a move away from the census enumeration as a safe harbor for one person, one vote, will inevitably force this Court into the kinds of knotty questions of survey design and statistics described above. Appellants' argument, thereby, raises concerns reminiscent of those involved with this Court's consideration of sampling and the census:

> The prospect of this Court's reviewing estimation techniques in the future, to determine which of them *so obviously* creates a distortion that it cannot be allowed, is not a happy one. (I foresee the new specialty of "Census Law.") Indeed, it is doubtful whether–separation-of-powers considerations aside–the Court would even have available the raw material to conduct such review effectively.

Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 349 (1999) (Scalia, J., concurring); *cf.* Persily, *The Law of the Census*, *supra*.

For similar reasons, the judgment of the U.S. District Court for the Western District of Texas should be affirmed.

Respectfully submitted,

NATHANIEL PERSILY
Counsel of Record
559 Nathan Abbott Way
Stanford, CA 94305-8610
(917) 570-3223
(npersily@law.stanford.edu)

September 25, 2015

No. 14-940

IN THE

Supreme Court of the United States

SUE EVENWEL, ET AL.,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF FOR PROJECT 21 AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

DAVID B. RIVKIN, JR.
Counsel of Record
ANDREW M. GROSSMAN
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Counsel for the Amicus Curiae

QUESTION PRESENTED

Whether the "one-person, one-vote" principle of the Fourteenth Amendment creates a judicially enforceable right ensuring that the districting process does not deny voters an equal vote.

RULE 29.6 STATEMENT

Amicus curiae Project 21 is an initiative of The National Center for Public Policy Research, which has no parent company. No publicly held company owns 10 percent or more of its stock.

TABLE OF CONTENTS

Page

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Equal Vote Weight Furthers the Principles and Purposes of One-Person, One-Vote 3

II. Equal Vote Weight Should Prevail Here for the Same Reasons It Has Under Section 2 8

A. Voting Rights Act Section 2 Embodies and Applies the Same Vote-Dilution Concerns Identified in *Reynolds* 9

B. Courts in Section 2 Vote-Dilution Cases Have Unanimously Rejected Arguments To Use Population Weight Instead of Vote Weight 11

C. The Same Reasoning Even More Strongly Supports Use of the Equal Vote Weight Criterion in One-Person, One-Vote Cases 14

D. Inconsistent Standards Under Section 2 and the Equal Protection Clause Present the Opportunity for Race-Based Gerrymandering and Vote Dilution 16

III. The Use of Raw Population in Apportionment Dilutes Black Votes and Black Voting Power 19

A. The Use of Total Population in Apportionment Dilutes Black Votes 21

B. The Use of Total Population in Apportionment Dilutes Black Communities' Voting Power 24

CONCLUSION 33

TABLE OF AUTHORITIES

Page

Cases

Allen v. State Board of Elections, 393 U.S. 544 (1969) 6, 7

Baker v. Car, 369 U.S. 186 (1962) 15

Barnett v. City of Chicago, 141 F.3d 699 (7th Cir. 1998) 12, 14, 15, 24–25, 29, 32

Barnett v. City of Chicago, 17 F. Supp. 2d 753 (N.D. Ill. 1998) 25

Barnett v. City of Chicago, 969 F. Supp. 1359 (N.D. Ill. 1997) 25

Bartlett v. Strickland, 556 U.S. 1 (2009) 1, 13, 17

Bush v. Vera, 517 U.S. 952 (1996) 18, 29

Campos v. City of Houston, 114 F.3d 544 (5th Cir. 1977) 11–12, 15

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2002) 20

Fairley v. Patterson, 393 U.S. 544 (1969) 8

Gomillion v. Lightfoot, 364 U.S. 339 (1960) 4

Gray v. Sanders, 372 U.S. 368 (1963) 6, 10

Hadley v. Junior College District, 397 U.S. 50 (1970) 4

Houston Lawyers' Ass'n v. Attorney General of Texas, 501 U.S. 419 (1991) 9

League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006) 13, 17

League of United Latin American Citizens Council No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990) 9, 15

Miller v. Johnson, 515 U.S. 900 (1995) 18–19, 32–33

Negron v. City of Miami Be ch, 113 F.3d 1563 (11th Cir. 1997) 11

Nipper v. Smith, 39 F.3d 1494 (11th Cir. 1994) 9

Nixon v. Herndon, 273 U.S. 536 (1927) 4–5

Northwest Austin Municipal Utility District No. One v. Holder, 557 U.S. 193 (2009) 1

Perez v. Pasadena Independent School District, 165 F.3d 368 (5th Cir. 1999) 12, 13

Perkins v. Matthews, 400 U.S. 379 (1971) 8, 11

Reyes v. City of Farmers Branch, Texas, 586 F.3d 1019 (5th Cir. 2009) 12

Reynolds v. Sims, 377 U.S. 533 (1964) ..... *passim*

Romero v. City of Pomona, 883 F.2d 1418 (9th Cir. 1989) 12

Shaw v. Reno, 509 U.S. 630 (1993) 7, 33

Shelby County v. Holder, 133 S. Ct. 2612 (2013) 1

Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965) 6

Thompson v. Glades Cny. Bd. of Cnty. Comm'rs, 493 F.3d 1253 (11th Cir. 2007) 13

Thornburg v. Gingles, 478 U.S. 30 (1986) 8, 10, 11, 29

Townsend v. Holman Consulting Corp., 914 F.2d 1136 (9th Cir. 1990) 12

Veasey v. Abbott, No. 14-41127 (5th Cir. filed Aug. 5, 2015) 29

Voinovich v. Quilter, 507 U.S. 146 (1993) 10, 11

Wesberry v. Sanders, 376 U.S. 1 (1964) 5, 16

Whitcomb v. Chavis, 403 U.S. 124 (1971) 4

Williams v. City of Dallas, 734 F. Supp. 1317 (N.D. Tex. 1990) 29

Statutory Provisions

Voting Rights Act, § 2 .....*passim*

Voting Rights Act, § 5 8

Other Authorities

Jesse Choper, Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights, 83 Mich. L. Rev. 1 (1984) 7

City of Dallas, City Council 28

City of Dallas Redistricting Commission, 2011 Adopted Districting Plan 26

Richard Engstrom, Corrected Rebuttal Report, *Perez v. State of Texas*, 5:11-cv-00360-OLG-JES-XR, ECF No. 307-1 (W.D. Tex. filed Sept. 13, 2011) 30

Michael Li, Two Texas Cases Test the Boundaries of Redistricting Law, Brennan Center for Justice (Feb. 17, 2015) 29

Peyton McCrary, Bringing Equality to Power, 5 U. Pa. J. Const. L. 665 (2003) 7

United States Census Bureau, American Community Survey, 5-Year Data Profiles 21

United States Census Bureau, Redistricting Data, Voting Age Population by Citizenship and Race (CVAP) 22

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus curiae Project 21, the National Leadership Network of Black Conservatives, is an initiative of the National Center for Public Policy Research to promote the views of African-Americans whose entrepreneurial spirit, dedication to family, and commitment to individual responsibility have not traditionally been echoed by the nation's civil-rights establishment. The National Center for Public Policy Research is a communications and research foundation supportive of the view that the principles of a free market, individual liberty, and personal responsibility provide the greatest hope for meeting the challenges facing America in the 21st century.

Project 21 participated as *amicus curiae* in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), and *Bartlett v. Strickland*, 556 U.S. 1 (2009), among other cases. The instant case concerns Project 21 because it raises vital questions about the nature and enforcement of voting rights and presents the opportunity to vindicate the right of Black citizens to cast votes of the same weight as other electors and the ability of Black communities

---

[1]Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the clerk.

to exercise the political power secured to them by this Court's one-person, one-vote decisions.

INTRODUCTION AND SUMMARY OF ARGUMENT

"One person, one vote" was a clarion call for Blacks whose individual votes and political power had been diluted by apportionment schemes that denied them an equally effective voice in the election of representatives. Yet Blacks' advances in political engagement following *Reynolds v. Sims* and other cases have been partially vitiated in many urban areas by districting decisions made on the basis of total population, rather than voting population, that fail to ensure that each citizen's vote be given as much weight as that of any other voter. Once again this Court's intervention is required to uphold the principle of equality in voting and thereby protect Black voting rights.

From the very beginning, the Court's one-person, one-vote cases have been concerned with enforcement of voting rights, particularly those that were denied to Black citizens. The Court was well aware that many jurisdictions abused the districting process to dilute Black votes and political power and thereby deny Black citizens full participation in representative government. As with earlier cases concerning more direct barriers to Black voting—such as race-based gerrymanders and whites-only primaries—the focus of these cases was always vindicating the right to vote, not a hypothetical right to equality of representation. Given this theoretical underpin-

ning of the one-person, one-vote principle, only measures of voting population, as opposed to total population including noncitizens, can provide a permissible basis for apportionment consistent with the principle's rationale and purposes.

That same view has, in fact, prevailed in districting litigation under Section 2 of the Voting Rights Act and should prevail here for the same reasons. As the Court has recognized, Section 2 builds on and furthers the same purposes of the one-person, one-vote principle—particularly the objective of ending vote dilution. The courts that have had occasion to consider the issue have unanimously concluded that voting population, not total population, is the appropriate metric for considering vote-dilution claims under Section 2, citing the law's focus on *vote* dilution, the practical consideration of providing remedies that are effectual in terms of elections, and the very nature of citizenship and voting rights. All apply with even greater force to the one-person, one-vote principle. Moreover, failure to harmonize districting principles under Section 2 and the Equal Protection Clause opens the door to abuses of the very kind that both were meant to prohibit.

Finally, as a factual matter, the use of raw population figures in apportionment dilutes the weight of Black votes and the political power of Black communities. Because Blacks are nearly always citizens, inclusion of non-citizens in the numbers used for apportionment tends to devalue Black votes. In major cities, the magnitude of this potential diminution in vote weight ranges from 10 percent in Chicago to 27

percent in Los Angeles. At that same time, use of total population also affects the drawing of district lines, depriving Black voters of majority-minority districts in some instances and the ability to elect their candidates of choice in coalition with other groups in others. Section 2 cases show that this is not a hypothetical impact but something that has actually happened in cities like Chicago and Dallas and likely many others. Perhaps surprisingly, the chief beneficiaries of this phenomenon have not been Latinos—whose political power would be little changed by use of voting population in apportionment—but white voters.

"[A] qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted." *Hadley v. Junior College District*, 397 U.S. 50, 52 (1970). The Court should reaffirm that right and reverse the decision of the court below.

ARGUMENT

I. Equal Vote Weight Furthers the Principles and Purposes of One-Person, One-Vote

"[T]he Civil War Amendments were designed to protect the civil rights of Negroes," *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971), and the Court's one-person, one-vote decisions were made with expressly that purpose in mind. Drawing on earlier decisions rejecting race-based gerrymandering, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), and whites-only primaries, *e.g.*, *Nixon v. Herndon*, 273 U.S. 536

(1927), the Court recognized as a general principle in *Reynolds v. Sims* that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." 377 U.S. 533, 555 (1964).

Reflecting its origins in cases concerning barriers to Black suffrage, that principle was premised on the idea of equal exercise of the right to vote—not, as would correspond with use of total population, a right to equality of representation. *Reynolds* identified its "objective" in precisely this way:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.

377 U.S. at 560 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964)).

Reynolds also framed the specific issue before the Court in terms of the voting right and, therefore, vote weight: "if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those

residing in the disfavored areas had not been effectively diluted." *Id.* at 562. *See also Gray v. Sanders*, 372 U.S. 368, 379 (1963) ("If a State in a statewide election weighted the male vote more heavily than the female vote or the white vote more heavily than the Negro vote, none could successfully contend that that discrimination was allowable."). And it connected that concept—vote weight—to the denial of rights based on race that the Court had rejected in its recent civil-rights case, explaining that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race." *Reynolds*, 377 U.S. at 566. *See also Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.").

The Court was not, of course, blind to the reality that dilution was among the most potent of the "second generation" barriers to enforcement of Blacks' voting rights. The apportionment plan at issue in *Reynolds* was marked by "[s]ystematic and intentional dilution of Negro voting power by racial gerrymandering," including through violation of the one-person, one-vote principle. *Sims v. Baggett*, 247 F. Supp. 96, 109 (M.D. Ala. 1965). The state's apparent purpose, the district court observed on remand from this Court, was "turning Negro majorities into minorities" in the state legislature. *Id.* Implicit in *Reynolds*, and stated explicitly in later cases, the one-person, one-vote rule was aimed at ad-

dressing, in part, the unfortunate reality "that guaranteeing equal access to the polls would not suffice to root out other racially discriminatory voting practices." *Shaw v. Reno*, 509 U.S. 630, 640 (1993) (citing *Allen*, 393 U.S. at 569).

In large measure, it succeeded. The "remarkable transformation in Southern electoral politics" of the decades following *Reynolds* was in large measure attributable to the "elimination of malapportioned legislatures and of at-large election systems...[,] in which litigation in the federal courts played the central role." Peyton McCrary, Bringing Equality to Power, 5 U. Pa. J. Const. L. 665, 666–67 (2003). *See also* Jesse Choper, Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights, 83 Mich. L. Rev. 1, 93–94 (1984) (discussing empirical studies on the "impact of reapportionment" in the wake of *Reynolds*).

Considered in this context, *Reynolds* and its progeny fit comfortably in the Court's broader jurisprudence of the civil-rights era, enforcing the individual rights that had been too often denied to Black citizens. And that is, in fact, *Reynolds's* central concern: "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." 377 U.S. at 567. At the core of one-person, one-vote lies the principle of vote equality, not equality of representation.

II. Equal Vote Weight Should Prevail Here for the Same Reasons It Has Under Section 2

In the Voting Rights Act (VRA), "'Congress intended to adopt the concept of voting articulated in *Reynolds v. Sims*, 377 U.S. 533 (1964), and protect Negroes against a dilution of their voting power.'" *Perkins v. Matthews*, 400 U.S. 379, 390 (1971) (quoting *Fairley v. Patterson*, 393 U.S. 544, 588 (1969) (Harlan, J., concurring in part and dissenting in part)). Building on the one-person, one-vote principle of *Reynolds* and subsequent cases, *Perkins* found that this anti-dilution purpose required jurisdictions subject to preclearance under Section 5 of the VRA to seek Department of Justice or federal court approval as to a "revision of boundary lines," including annexation, because "it dilutes the weight of the votes of the voters to whom the franchise was limited before the annexation, and 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Id.* at 388 (quoting *Reynolds*, 377 U.S. at 555).

Section 2 of the VRA also embodies this anti-dilution purpose by prohibiting voting laws or practices that deny minority voters "an equal opportunity to participate in the political processes and to elect candidates of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (quotation omitted). Section 2 provides a remedy for laws or practices that "cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives," including those that "may operate to minimize

or cancel out the voting strength of racial minorities in the voting population." *Id.* at 47 (quotation marks and alterations omitted).

The courts that have had occasion to consider the issue have unanimously concluded that voting population, not total population, is the appropriate metric for considering vote-dilution claims under Section 2. In making that determination, courts have drawn on the vote-dilution concepts articulated in *Reynolds* and related equal-protection cases, and their reasoning demonstrates equally that voting population is the correct standard for apportionment under the Fourteenth Amendment.

A. Voting Rights Act Section 2 Embodies and Applies the Same Vote-Dilution Concerns Identified in *Reynolds*

The Court's Section 2 decisions and one-person, one-vote decisions are premised upon the same principle of combatting *vote* dilution. The "foundation" for the Section 2 concept of "minority vote dilution" is the "notion of individual vote dilution, first developed by the Supreme Court in *Reynolds v. Sims*...." *League of United Latin Am. Citizens Council No. 4434 v. Clements*, 914 F.2d 620, 627 (5th Cir. 1990).[2] *See also Nipper v. Smith*, 39 F.3d 1494, 1510 & n.33 (11th Cir. 1994) (same). *Reynolds* warned of "legislative districting schemes which give the same number

---

[2] *Rev'd on other grounds, Houston Lawyers' Ass'n v. Attorney Gen. of Tex.*, 501 U.S. 419 (1991).

of representatives to unequal numbers of constituents," with the result of "[o]verweighting and overvaluation" of some citizens' votes as compared to others, depending on "where they happen to reside." 377 U.S. at 563. Thus, "[t]wo, five, or 10" citizens in an overpopulated district "must vote before the effect of their voting is equivalent to that of their favored neighbor." *Id.* *See also Gray v. Sanders*, 372 U.S. 368, 379 (1963) ("How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?").

The Court's Section 2 precedents have applied this principle to "the manipulation of district lines" that acts to "dilute[] minority voting power." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). In particular, the Court has recognized that dilution can occur when district lines divide a minority group "among various districts so that it is a majority in none," thereby preventing the group "from electing its candidate of choice." *Id.* It can also occur where members of a minority group are "packed" into districts so that the group, though "a super-majority" in that district, "will be assured only" of candidates in that district, thereby diluting its overall voting strength. *Id.* at 153–4. *See also Gingles*, 478 U.S. at 46 n.11.

In these respects, one-person, one-vote and Section 2 both share the same concern and the same objective: ensuring that state apportionment plans do not dilute citizens' voting power and thereby compromise their "inalienable right to full and effective partici-

pation in the political processes of [their] State's legislative bodies." *Reynolds*, 377 U.S. at 565. *See also Perkins*, 400 U.S. at 390.

B. Courts in Section 2 Vote-Dilution Cases Have Unanimously Rejected Arguments To Use Population Weight Instead of Vote Weight

This concern about unwarranted vote dilution has led courts in Section 2 cases to conclude unanimously that equal vote weight, not equality of representation based on raw population, is the appropriate standard against which to judge districting decisions that are alleged to have an impermissible discriminatory effect on minority groups.

This focus on equal vote weight flows from the very injury for which Section 2 provides a remedy: vote dilution. The "manipulation of district lines" resulting in "diluting minority voting power," *Voinovich*, 507 U.S. at 153, is only a cognizable injury that can be remedied in a meaningful way if "a minority group [is] composed of a sufficient number of voters" either to "elect a representative" or to "have a meaningful potential to do so," *Negron v. City of Miami Beach*, 113 F.3d 1563, 1569 (11th Cir. 1997). *See also Gingles*, 478 U.S. at 50 n.17 ("Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice....").

As the Fifth Circuit correctly recognized, this requires a court to consider voting population. The

"*raison d'etre* of *Thornburg* and of amended § 2," it observed, is "preventing dilution of [minority] votes." *Campos v. City of Houston*, 113 F.3d 544, 548 (5th Cir. 1997) (quotation marks omitted). Thus, because "only voting-age persons who are United States citizens can vote[,] [i]t would be a Pyrrhic victory for a court to create a single-member district in which a minority population dominant in absolute, but not in [citizen] voting age numbers, continued to be defeated at the polls." *Id.* (quotation marks omitted). Evaluating a claim of *vote* dilution, to state the obvious, requires an analysis of *voters* and *voting* population.

The other courts to consider this issue have applied the same reasoning to reach the same conclusion. *See Romero v. City of Pomona*, 883 F.2d 1418, 1425 (9th Cir. 1989)[3] ("the purpose of [the] geographical compactness [test] is to first determine whether minorities are capable of commanding a majority vote in a single-member district"); *Barnett v. City of Chicago*, 141 F.3d 699, 704 (7th Cir. 1998) ("We think that citizen voting-age population is the basis for determining equality of voting power that best comports with the policy of the statute."); *Perez v. Pasadena Indep. Sch. Dist.*, 165 F.3d 368, 372 (5th Cir. 1999) (holding that courts must consider citizen voting-age population in because that metric "is required by the plain language of Section 2"); *Reyes v. City of Farmers Branch, Tex.*, 586 F.3d 1019, 1023

---

[3] *Abrogated on other grounds by Townsend v. Holman Consulting Corp.*, 914 F.2d 1136 (9th Cir. 1990).

(5th Cir. 2009) (reaffirming that citizen voting age population is the appropriate metric because "only voting-age citizens can be 'voters' who 'could form a majority'" under the Court's Section 2 precedent) (quoting *Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) (plurality opinion)); *Thompson v. Glades Cnty. Bd. of Cnty. Comm'rs*, 493 F.3d 1253, 1263 n.19 (11th Cir. 2007)[4] (recognizing the "crucial distinction between a district with a majority of *eligible* minority voters and a district that is only majority minority because non-citizens are included in the count of the minority population").

Indeed, this Court articulated the very same reasoning in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 429 (2006) (*LULAC*). In discussing the configuration of a potential majority-Latino district, the Court acknowledged that Latinos were "a bare majority of the voting-age population," but this was "only in a hollow sense" because "the relevant numbers must include citizenship." *Id.* The Court held that only a measure like citizen voting age population (CVAP) "fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates." *Id.*

In addition to flowing conceptually from the injury Section 2 addresses and from "the plain language of Section 2" itself, *Perez*, 165 F.3d at 372, the use of voting population also derives from the "very concept

---

[4] *Rehearing en banc granted, opinion vacated on other grounds*, 532 F.3d 1179 (2008).

of citizenship" in the United States, which would be "diluted if noncitizens are allowed to vote either directly or by the conferral of additional voting power on citizens believed to have a community of interest with the noncitizens." *Barnett*, 141 F.3d at 704. "The right to vote," after all, "is one of the badges of citizenship." *Id.*

For that reason, courts of appeals have rejected the notion of "virtual representation"—the assumption that parents vote for the interests of their children and that citizens vote for the interests of noncitizens of the same race—as the basis for using raw population in Section 2 cases. *Id.* Although the proposal to "give extra votes to families with more than the average number of children" or to "give extra voting power to a racial or ethnic group which happens to have a higher than average number of children"—or, "by the same token," a higher than average number of noncitizens—could "be defended with reference to the concept of virtual representation," the concept is "a bizarre suggestion in our political culture." *Id.* And "its bizarreness is a clue that the concept of virtual representation is unlikely to have been adopted by the Voting Rights Act." *Id.*

C. The Same Reasoning Even More Strongly Supports Use of the Equal Vote Weight Criterion in One-Person, One-Vote Cases

Both of the bases that courts have cited for using vote weight in Section 2 cases apply with even greater force with respect to the one-person, one-vote principle.

First, the equal-protection mandate of voter equality is unquestionably a prohibition against vote dilution. Prior to the enactment of Section 2, the Court in *Baker v. Carr*, 369 U.S. 186 (1962), ruled that claims "that the right to vote of certain citizens was effectively impaired since debated and diluted" are justiciable. *Reynolds*, 377 U.S. at 556. In *Reynolds*, the Court determined that such claims have constitutional merit because "[d]iluting the weight of votes because of place of residence impairs basic constitutional right under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race." 377 U.S. at 566. This is the genesis of the concept vote dilution, *Clements*, 914 F.2d at 627, and "preventing dilution of...votes" through apportionment requires, in the equal-protection context as in the Section 2 context, consideration of those who "can vote." *Campos*, 113 F.3d at 548 (quotation marks omitted). Indeed, "[i]t would be"—and has, in some cases, been—"a Pyrrhic victory for a court to" order reapportionment of districts in which citizens' votes will continue to be diluted because of large inequalities in voting population by district. *Id.* (quotation marks omitted). The remedy is simply the disease in another form.

Second, the "very concept of citizenship," *Barnett*, 141 F.3d at 704, that has led courts to reject use of total-population figures in Section 2 cases is at the core of the one-person, one-vote principle. *Reynolds's* legal analysis begins by affirming "the right of all qualified citizens to vote," and draws from that the principle that the Constitution forbids "debasement

or dilution of the weight of a citizen's vote" just as it forbids "wholly prohibiting the free exercise of the franchise." 377 U.S. at 554–55. Underlying that principle is a particular view of the nature of democratic government, one premised on the rights and responsibilities of citizenship: "'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.'" *Id.* at 560 (quoting *Wesberry*, 376 U.S. at 17). The basis of one-person, one-vote is the notion that "each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies," and "citizens can achieve this participation only as qualified voters through the election of legislators to represent them." *Id.* at 565.

In other words, one-person, one-vote is a necessary incident of *citizen* control of government through the democratic process. Thus, the Court's observation in *Reynolds* that, "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." *Id.* at 567. No less than in Section 2 cases, preventing such dilution requires that courts in equal-protection cases enforce the equal-vote-weight criterion.

D. Inconsistent Standards Under Section 2 and the Equal Protection Clause Present the Opportunity for Race-Based Gerrymandering and Vote Dilution

Aside from establishing the proper approach for analyzing vote dilution, the Section 2 decisions mandating the use of voting population in drawing ma-

jority-minority districts present a practical problem: map-drawers typically use CVAP and total population numbers side-by-side in districting. CVAP is used for determining whether a majority of minority voters is or can be placed within a district, and total population is used for determining whether the district falls within an appropriate population deviation from the ideal.

That approach, at a minimum, requires additional race-conscious decision-making in drawing majority-minority districts and, at worst, creates opportunities for intentionally manipulating voting strength based on race. If a legislative body identifies a reasonably compact group of minority *voters* that is politically cohesive in an area with racial bloc voting, it is required to draw them into a district with more than 50 percent eligible voters of that race. *Bartlett*, 556 U.S. at 12–14 (plurality opinion); *LULAC*, 548 U.S. at 429–30. At the same time, however, the district must have roughly equal population compared with other districts in the jurisdiction to comply with the equal-protection clause, and the metric for judging equality will be total population. Thus, once a district is drawn to have 50 percent plus 1 minority eligible voters, the question becomes: who else should be drawn into the district to comply with one person, one vote? If nonvoters are not equally distributed in the area (which is the only scenario where the distinction between CVAP and total population makes a difference) then the map-drawer must decide whether to fill out a majority-minority district with a large number of eligible voters or

nonvoters. The answer to that question determines the relative voting strength of the minority voters in the district compared with voters (minority or otherwise) in surrounding districts.

The decision becomes even more complicated—and more fraught with racial considerations—if the majority-minority district is contiguous with other majority-minority districts, as is often the case. Suppose that one portion of a city has a significant population of minorities, including a large segment of Latino residents (citizen and noncitizen) and a large segment of Black residents. If there is racial bloc voting, the legislature will likely be required under Section 2 to draw both a majority-Black and a majority-Latino district, assuming it can feasibly do so consistent with its traditional redistricting principles. Each majority-minority district will be comprised of at least 50 percent Latino and Black voters, respectively, which will allow these groups the *opportunity* to elect their preferred candidates.

The districts, however, will also include other residents to comply with the equal-protection clause, and (again, assuming consistency with traditional districting principles) the government will have discretion in deciding who those residents will be, *see Bush v. Vera*, 517 U.S. 952, 977–78, 984 (1996) (principal opinion), and will be faced with choosing the relative weight of Black and Latino votes by deciding where to place the communities with high numbers of nonvoters. At best, this confronts the legislature with yet another race-based choice in a process where race should not be "predominant." *Miller*

v. Johnson, 515 U.S. 900, 916 (1995). At worst, this allows the legislature to intentionally favor one racial group over another. And given that Blacks and Latinos disproportionately reside in proximity to one another in disadvantaged parts of urban areas, this scenario is not at all unusual.[5]

By contrast, a legislature that uses CVAP both in drawing Section 2 districts *and* in apportioning population does not get to decide what the relative voting strength of racial minorities in Section 2 districts will be. Instead, the legislature in that instance is required to fill out each district with eligible voters, and the relative weight of those eligible voters' votes will be secured. This limits the potential for manipulation of vote weight based on race and the potential for invidious discrimination.

III. The Use of Raw Population in Apportionment Dilutes Black Votes and Black Voting Power

States depart from the equal-protection mandate and frustrate the political power of minority communities when they apportion districts to comport with a total-population measure of the ideal equal population. This metric causes vote dilution when "eligible voters are unevenly distributed" across a jurisdiction and voters in districts with dispropor-

---

[5] The discussion of the layout of Dallas, Texas, *infra* § III.B, indicates that Blacks and Latinos reside in contiguous and overlapping communities in the southern portions of that city. Many cities have similar layouts.

tionate numbers of noncitizens "leverage the votes of the smaller number of eligible voters" to exercise disproportionate electoral power. *Chen v. City of Houston*, 206 F.3d 502, 525 (5th Cir. 2000). Because the uneven distribution of eligible voters often correlates with geographically compact communities of noncitizens, which in turn correlates with race, the misuse of total population as the basis for district apportionment almost inevitably leads to racial inequality in voting power.

As with most other deviations from basic principles of equality in voting, the result tends to be the dilution of Black votes and political power. That is because, where noncitizens comprise a meaningful proportion of the population, Blacks nearly always comprise a higher percentage of the voting population than of the total population.

Thus, where states use total population, rather than CVAP or another measure that generally reflects voter eligibility, in apportioning their districts, Black voters are disadvantaged, in two distinct ways. First, and most obviously, each individual Black voter wields less voting power when districts are drawn based on total-population figures rather than voting-population figures. Second, Black communities, which are often cognizable "communities of interest" drawn into districts either under Voting Rights Act Section 2 or simply under traditional districting principles, are diminished in their ability to elect their preferred candidates of choice and are commensurately underrepresented in legislative bodies compared to their actual voting strength.

These impacts are not hypothetical. As a factual matter, Black citizens today are suffering both kinds of injuries in many major urban areas due to states' misuse of total-population metrics in apportionment.

A. The Use of Total Population in Apportionment Dilutes Black Votes

The dilution of individual Black votes flows directly from differences between Blacks' proportion of the voting population and of the total population in many urban areas. These differences range from modest to stark, but in each case the use of total population in drawing districts meaningfully dilutes the value of individual Black votes, as Black voters are more likely to reside in districts containing fewer noncitizens and therefore more voters.

- In Chicago, the population of voting-age Black citizens is 628,015, or roughly 35.3 percent of the total voting population. The total Black population is estimated to be 862,567, or roughly 31.9 percent of the total population. Accordingly, apportionment according to total population rather than CVAP could potentially diminish the value of a Black citizen's vote by nearly 10 percent.[6]

---

[6] The total-population data for each city described here is taken from the U.S. Census Bureau's American Community Survey data. United States Census Bureau, American Community Survey, 5-Year Data Profiles, *available at* http://www.census.gov/acs/www/data/data-tables-and-tools/data-profiles/ (last visited Aug. 6, 2015). The figures cited

- In New York City, the population of voting-age Black citizens is 1,224,990, or roughly 23.8 percent of the total voting population. The total Black population is 1,677,183, or roughly 22.7 percent of the total population. Apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by nearly 5 percent.
- In Los Angeles, the population of voting-age Black citizens is 266,275, or roughly 12.4 percent of the total voting population. The total Black population is 346,201, or roughly 9.01 percent of the total population. Apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by over 27 percent.
- In Miami, the population of voting-age Black citizens is 41,480, or roughly 19.7 percent of the total voting population. Black total population is 69,102, or roughly 17.0 percent of the total

---

here for total Black population corresponds to the category "Black or African American alone," which excludes individuals who identify as being Black and "Hispanic or Latino" on the Census form. The citizen voting-age population data for each city described here is taken from the U.S. Census Bureau's Redistricting dataset. United States Census Bureau, Redistricting Data, Voting Age Population by Citizenship and Race (CVAP), *available at* https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html (last visited Aug. 6, 2015). The figures cited here for total Black population correspond to the category "Black or African American alone."

population. Apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by nearly 14 percent.

- In Houston, the population of voting-age Black citizens is 355,225, or roughly 29.8 percent of the total voting population. The Black total population is 491,973, or roughly 23.01 percent of the total population. Apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by nearly 23 percent.
- In Dallas, the population of voting-age Black citizens is 213,690, or roughly 30.9 percent of the total voting population. The total Black population is 296,480, or roughly 24.3 percent of the total population. Apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by over 21 percent.
- In Atlanta, the population of voting-age Black citizens is 175,705, or roughly 53.5 percent of the total voting population. The Black total population is 229,023, or roughly 52.9 percent of the total population. Apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by over one percent.

In each of these cities, the use of total population, rather than a measure of voting population, in apportionment diminishes the weight of individual

Black votes, often by substantial amounts. And while these examples are representative large U.S. cities, the same phenomenon is evident in smaller localities across the United States where substantial numbers of noncitizens reside. Just one example is San Bernardino, California, where the population of voting-age Black citizens is 20,105, or roughly 17.1 percent of the voting population. The total Black population is 27,984, or roughly 13.2 percent of the total population. Accordingly, apportionment according to total population rather than CVAP could potentially diminish the value of a Black vote by nearly 23 percent.

B. The Use of Total Population in Apportionment Dilutes Black Communities' Voting Power

The diminishment of weight accorded to Black votes when states use total population, rather than CVAP, in reapportionment is clear enough from the numbers alone. The negative impact on the ability of Black communities to elect their candidates of choice in actual districts is more difficult to discern, given the political and geographic factors involved in redistricting. But the evidence is clear that there is such an impact and that, in some instances, it is substantial.

The best evidence comes from Section 2 litigation. For example, *Barnett v. City of Chicago*, 141 F.3d 699 (7th Cir. 1998), considered a Section 2 challenge to Chicago's ward map brought by Black and Latino voters who alleged that their communities were un-

derrepresented in the ward system. Using the city's total population percentages, the district court found that Black and Latino voters were both proportionally represented according to their respective population percentages: they comprised 39 and 20 percent of the population, respectively, and comprised meaningful majorities in, respectively, 38 and 14 percent of the wards. *Id.* at 703; *Barnett v. City of Chicago*, 969 F. Supp. 1359, 1450–51 (N.D. Ill. 1997). On that basis, the district court rejected both groups' Section 2 claims. *Barnett*, 969 F. Supp. at 1458–59.

The appeals court affirmed the decision as to the Latino plaintiffs but reversed as to the Black plaintiffs. Relying on CVAP numbers, it found large deviations from equality in representation in Chicago's ward system: "Blacks are underrepresented, whites and Latinos overrepresented." *Barnett*, 141 F.3d at 705. The difference was "not trivial," and the Black plaintiffs were able to show that an alternative map would result in an additional majority-Black ward—one that the district court had discounted due to its use of total population. *Id.* at 704–05. On remand, the district court concluded that the maps presented by the Black plaintiffs "better balance the relevant factors than does the existing map" and ordered the city council to redraw the wards accordingly. *Barnett v. City of Chicago*, 17 F. Supp. 2d 753, 759 (N.D. Ill. 1998). The result of apportionment according to CVAP, rather than total population, was the gain of an additional majority-Black district.

That result is as likely to occur even without the conscious effort to draw majority-minority districts

because, ultimately, numbers drive the apportionment process. One example of a locality where equalized voting population may improve the ability of Blacks to elect their preferred candidates is the city of Dallas, Texas. As noted above, the best available estimates indicate that Blacks comprise 24.3 percent of Dallas's total population and 30.9 percent of the eligible voters. Latinos comprise 41.9 percent of Dallas's total population, but only 21.5 percent of the eligible voters. Whites comprise 29.3 percent total population and 43.3 percent of the voting-age population.[7]

The city is currently apportioned by total population, not CVAP.[8] The most recent redistricting plan, approved in 2011, divides the city into 14 single-member city-council districts. These districts were drawn with a total population deviation of approximately 10 percent (plus or minus 5 percent from the ideal). Under the total-population metric, 4 districts (Districts 1, 2, 5, and 6) have substantial Latino to-

---

[7] These numbers come from the sources cited in n.6 *supra*.

[8] The information in this section concerning the 2011 Dallas City Council map is publicly available from the 2011 Adopted Districting Plan report of the City of Dallas Redistricting Commission, *available at* http://dallascityhall.com/departments/intergovernmentalservices/redistrictingcommission/DCH%20Documents/Submission_adopted_packet100511.pdf (last visited Aug. 6, 2015). There are, of course, minor discrepancies between the data reflected in this document and that from the sources in n.6 *supra*. The numbers throughout this section for total population refer to the Census numbers referenced above.

tal-population majorities, ranging from 62.59 to 79.17 percent. *Id.* The voting-age population of each is several percentage points lower, but remains well above 50 percent, ranging from 56.10 to 74.19 percent.[9] Three districts (Districts 4, 7, and 8) have majority-Black voting-age population, ranging from 50.76 to 60.57 percent. In addition, Districts 3 and 10 are "minority coalition" districts where neither Latinos nor Blacks comprise a majority, but together outnumber white voters. The remaining five districts are majority white. The majority-Black and majority-Latino districts, along with District 3, cover the south side of Dallas and are all contiguous with one other, indicating that the minority population is concentrated in that part of the city. District 10, the other coalition district, is on the northeast side of Dallas.

That configuration is, as one would expect, roughly consistent with the total-population figures noted above. Latinos comprise 42 percent of the total population and have majorities in 4 of the 14 of the districts (and significant representation in the two "coalition" districts), while Blacks comprise 25 percent of the total population and have majorities in 3 of the 14 districts (and significant representation the two "coalition" districts). But this configuration also reflects huge disparities among voter numbers. Latinos

---

[9] District-by-district CVAP appears not to have been provided in the city's redistricting materials. Voting-age population as reflected in the Dallas Redistricting Commission documents includes noncitizens.

comprise only 22 percent of potential voters, yet have majorities in nearly 30 percent of the districts; Blacks comprise 31 percent of potential voters, yet have majorities in only 21 percent of the districts. In this respect, Black communities' political power in Dallas is undermined by the use of total-population figures in districting.

The current makeup of the city council not only confirms this discrepancy, but also suggests that *white* voters are the beneficiaries of the inequality in voting power. Currently, white council members represent all majority-white districts and one of the minority coalition districts.[10] All three Black districts are represented by Black councilmembers, which is notable given that Black voters comprise only a bare majority of District 7 voters, and a Black councilmember represents the other coalition district (District 3). However, only two of four majority-Latino districts (Districts 2 and 6) are represented by Latino councilmembers. White councilmembers represent both of the remaining majority-Latino districts (Districts 1 and 5), even though Blacks have meaningful voting-age population in each, particularly in District 5, and appear to have Black voting-age population to spare in two contiguous majority-Black districts (Districts 4 and 8) and in a contiguous majority-Latino district (District 6). Thus, with

---

[10] *See* City of Dallas, City Council, *available at* http://dallascityhall.com/government/Pages/city-council.aspx (last visited Aug. 6, 2015).

the Black population divided in this manner and the Latino population lacking in voting strength to elect Latino candidates, whites hold 57 percent of Dallas's City Council seats, despite comprising less than 30 percent of Dallas's total population and 43 percent of its voter population.

Significantly, the race of candidates and elected officials matters in Dallas because there is evidence of racially polarized voting in the region. *Barnett*, 141 F.3d at 702. *Cf. Thornburg v. Gingles*, 478 U.S. 30, 52 (1986). That, of course, would be typical of any Southern city with a history of racial discrimination and racial tension.[11] Multiple court cases have confirmed that it is the case in Dallas specifically, *see, e.g.*, *Bush v. Vera*, 517 U.S. 952, 995 (1996) (O'Connor, J., concurring) ("Dallas County has a history of racially polarized voting."), including in Dallas City Council elections, *Williams v. City of Dallas*, 734 F. Supp. 1317, 1388 (N.D. Tex. 1990). *See generally Veasey v. Abbott*, No. 14-41127 (5th Cir. filed Aug. 5, 2015), at 30 (noting Texas's concession that "racially polarized voting exists in 252 of its 254 counties").

And, in fact, there is statistical evidence, current as of the 2011 redistricting of Dallas, of racially po-

---

[11] *See* Michael Li, Two Texas Cases Test the Boundaries of Redistricting Law, Brennan Center for Justice (Feb. 17, 2015), *available at* https://www.brennancenter.org/blog/two-texas-cases-test-boundaries-redistricting-law (last visited Aug. 6, 2015) ("Racially polarized voting exists in Dallas County—as it does in most of Texas and the South.").

larized in the Dallas region. In ongoing Section 2 litigation concerning Texas's congressional and legislative districts, the Texas Latino Redistricting Task Force submitted the expert testimony of Duke University professor Richard Engstrom, who analyzed elections in the Dallas region through ecological inference analysis developed by Gary King.[12] Dr. Engstrom concluded that there is "racially polarized voting in Dallas County" as to Blacks, whites, and Latinos. In general elections, "Latinos were very cohesive in their preferences for Latino candidates with the Democratic nomination, and that preference was shared by African Americans," but not by white voters. More importantly, in *primaries*—the relevant elections due to strong party preference—"Latinos are likewise very cohesive in their preferences for Latino candidates," but "these preferences are not usually shared by the non-Latino voters participating in them." Significantly, Blacks "were revealed to be the least likely group to support Latino candidates in Democratic primaries." It is therefore highly improbable that the preferred candidates of choice for Latino voters in Dallas city council elections are white or, for that matter, Black.

All of this indicates that the equalization of total population, but not voting population, aids the ability of white voters in electing their preferred candidates of choice, detracts from the ability of Blacks to

---

[12] *Perez v. State of Texas*, 5:11-cv-00360-OLG-JES-XR, ECF No. 307-1, at 1, 14–15 (W.D. Tex. filed Sept. 13, 2011).

elect their preferred candidates of choice, and makes little or no difference for Latinos. Latinos have managed to elect their candidates of choice in only two of four districts, Districts 2 and 6, and in *neither* coalition district, even with districts apportioned by total population. Notably, because Districts 2 and 6 are on the lower end of Latino voting-age population in majority-Latino districts (56 and 65 percent, respectively), it seems probable that noncitizen Latinos are not evenly distributed through the majority-Latino districts, but rather are concentrated in Districts 1, 3, and 5, which are not represented by Latinos. There is very little reason to believe that reapportionment to achieve voter equality would result in *fewer* districts represented by Latinos.

Blacks, meanwhile, are underrepresented as compared with their share of Dallas's citizen voting-age population. This is not for lack of electoral cohesiveness: the Black community appears to have succeeded in electing its preferred candidates in the three majority-Black districts. Blacks also appear to have elected their candidate of choice in District 3, which would almost certainly be solidified as a majority-Black district under equal-vote apportionment. But they currently have little hope of electing their preferred candidates in the other coalition district, District 10, where white voting-age population is notably higher than Black voting-age population. Expanding that district could draw in additional Black population in contiguous Districts 9, 11, or 13, to give the Black community greater numbers or even a majority in that district. And the relatively signifi-

cant percentage of Black voters in majority-Latino Districts 1 and 5 (compared to the percentage of white voters in those districts), and proximity of those districts to other districts with additional Black voting-age population, suggest that redistricting according to CVAP would result in additional Black representation—almost certainly one, and perhaps two, additional secure majority-Black districts and multiple additional districts where Black candidates of choice would be competitive or successful.

Besides demonstrating the likelihood that using CVAP would likely improve the ability of Black communities to elect their preferred candidates of choice, the Dallas example also shows that the "losers" in an equal-voter regime may not be Latino voters. The beneficiaries of a total-population apportionment system are residents of low-voter districts who are able to elect their preferred candidates of choice more easily than similarly situated individuals and communities in high-voter districts. Where a district has a low number of eligible voters because of a disproportionate number of noncitizen residents, the citizen residents may or may not be of the same race as the noncitizens and, even if they are of the same race, may or may not "have a strong community of interest" with the noncitizens. *Barnett*, 141 F.3d at 704. *See also Miller v. Johnson*, 515 U.S. 900, 911–12 (1995) ("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same

political interests, and will prefer the same candidates at the polls.'") (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

It therefore can neither be assumed that districts with large numbers of noncitizen Latinos will also include large numbers of voting Latinos nor that voting Latinos will represent the interests of noncitizens. Again, in Dallas, the voters in districts that appear to have large percentages of noncitizen Latinos appear to have had little interest in electing Latino-preferred candidates, and there is no reason to believe that will not typically be the case.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

DAVID B. RIVKIN, JR.
Counsel of Record
ANDREW M. GROSSMAN
RICHARD B. RAILE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1731
drivkin@bakerlaw.com

Counsel for the Amicus Curiae

AUGUST 2015

Supreme Court, U.S.
FILED
AUG - 7 2015
OFFICE OF THE CLERK

No. 14-940

In the Supreme Court of the United States

SUE EVENWEL, EDWARD PFENNINGER,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIALCAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF AMICUS CURIAE OF TENNESSEE STATE LEGISLATORS AND THE JUDICIAL EDUCATION PROJECT IN SUPPORT OF APPELLANTS

Linda Carver Whitlow Knight
Gullett Sanford Robinson & Martin PLLC
Suite 1700
150 Third Avenue, South,
Nashville, TN 37201
615-244-4994
lknight@gsrm.com

John J. Park, Jr.
Counsel of Record for Amicus Curiae
Strickland Brockington Lewis LLP
1170 Peachtree Street NE,
Suite 2200
Atlanta, GA 30309
678.347.2208
jjp@sbllaw.net

(additional counsel for Amici Curiae are listed inside the front cover)

Carrie Severino
Jonathan Keim
Judicial Education Project
722 12th St. NW, Fourth Floor
Washington, DC 20005
(571) 357-3134

Erin Morrow Hawley
University of Missouri School of Law
212 Hulston Hall
Columbia, MO 65211

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

Exclusive Reliance on Total Population to Apportion Districts May Unconstitutionally Dilute the Votes of Rural Citizens. 6

A. Early one-person, one-vote cases involved regional battles pitting underrepresented urban interests against rural interests. 7

B. Exclusive reliance on total population to the exclusion of actual or potential voters can create the same problems that this Court confronted some 50 years ago. 12

1. The exclusive use of total population apportionment mandated by the Texas Senate Plan results in vote dilution. 12

2. The exclusive use of total population apportionment has resulted in vote dilution in other places and for plans other than the Texas Senate Plan. 13

3. The exclusive use of total population apportionment may result in vote dilution in Tennessee. 16

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Baker v. Carr, 369 U.S. 186 (1962) ..... *passim*

Chen v. City of Houston, 206 F. 3d 502 (5th Cir. 2000) 14

Colegrove v. Green, 328 U.S. 549 (1946) 7

Garza v. County of Los Angeles, 918 F. 2d 763 (9th Cir. 1991) 14

Gray v. Sanders, 372 U.S. 368 (1963) ..... *passim*

Kidd v. McCanless, 200 Tenn. 273, 292 S.W. 2d 40 (Tenn. 1956) 4, 8

Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga.), aff'd sub nom. *Cox v. Larios*, 542 U.S. 947 (2004) 15

Mahan v. Howell, 410 U.S. 315 (1973) 13

Reynolds v. Sims, 377 U.S. 533 (1964) ..... *passim*

State v. Crowell, 631 S.W.2d 702 (Tenn. 1980) 16

Wesberry v. Sanders, 376 U.S. 1 (1964) 10

Constitutional Provisions

TENN. CONST. Art. II, §§ 5 and 6 8

Rules

Rule 37.2(a).....1

37.6.....1

Other Authorities

Pet. For Cert., *Lepak v. City of Irving*, No. 12-777, in the Supreme Court of the United States.....14

Publications

Matthew D. McCubbins, *Congress, the Courts, and Public Policy: Consequences of the One Man, One Vote Rule*, 32 AM. J. OF POL. SCI. 388 (1988).....16

STATEMENT OF AMICI CURIAE

This amicus brief is submitted by legislators from the State of Tennessee and by the Judicial Education Project in support of the Evenwel Appellants.[1] Amici write separately to explain why exclusive reliance on population for reapportionment can unfairly, unreasonably, and unconstitutionally dilute rural votes.

Amici Tennessee Senators and Representatives represent districts as follows:

Lieutenant Governor Ronald Ramsey represents the 4th District, covering Johnson County, which contains the town of Johnson City; Sullivan County, which contains the towns of Bristol and Kingsport; and part of the lightly-populated county of Carter.

Senator Mark Norris, the Senate Majority Leader, represents the 32nd District, which includes Tipton County, a rural county, and a more lightly-populated, suburban area of Shelby County.

Senator Paul Bailey represents the 15th District, which covers the rural counties of

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Communications reflecting such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae or their counsel made a monetary contribution to the brief's preparation or submission.

Cumberland, Jackson, Overton, Bledsoe, Putnam, and White.

Senator Mae Beavers represents the 17th District, which covers the lightly-populated counties of Cannon, Clay, DeKalb, Macon, and Smith; and Wilson County, which contains the town of Lebanon.

Senator Janice Bowling represents the 16th District, which covers the rural counties of Coffee, Franklin, Grundy, Marion, Sequatchie, Van Buren and Warren.

Senator Mark Green represents the 22nd District, which covers the lightly-populated counties of Houston and Stewart; and Montgomery County, which contains the small city of Clarksville.

Senator Delores Gresham represents the 26th District, which covers the lightly-populated counties of Chester, Decatur, Fayette, Hardeman, Hardin, Haywood, Henderson, and McNairy.

Senator Ferrell Haile represents the 18th District, which covers the lightly-populated county of Trousdale; Sumner County, a rapidly growing county, containing the towns of Gallatin and Hendersonville; and a more-lightly populated, suburban area of Davidson County (Metropolitan Nashville).

Senator Ed Jackson represents the 30th District, which includes the rural counties of Crockett, Lake, Dyer, and Lauderdale; and Madison County, which includes the small city of Jackson.

Senator Bill Ketron represents the 13th District, which covers part of Rutherford County, a county that is rapidly increasing in population.

Senator Jim Tracy represents the 14th District, which covers the lightly-populated counties of Bedford, Lincoln, Marshall, and Moore; and a suburban portion of Rutherford County, which contains the small city of Murfreesboro.

Representative Glen Casada, the House Republican Caucus Chairperson, represents the 63rd District, which includes part of Williamson County.

Representative William Lamberth represents the 44th District, which includes part of Sumner County, a rapidly growing suburban and rural county containing the towns of Gallatin and Hendersonville.

Representative Ron Lollar represents the 99th District, which consists of the northeast portion, lightly populated, of Shelby County.

Representative Terri Lynn Weaver represents the 40th District, which includes the rural counties of Smith, Trousdale and part of DeKalb, and Sumner County, a rapidly growing suburban and rural county.

Representative Ryan Williams represents the 42nd District, consisting of part of Putnam County, a less populated county that includes the town of Cookeville.

Maclin P. Davis, Jr., Esq. is a retired attorney from Nashville, Tennessee. As a young member of

the Tennessee House of Representatives in the early 1950s, he pressed the House Leadership, which was controlled by rural Democrats, to reapportion and redistrict the General Assembly, as required by the State Constitution. This had not been done since the turn of the 20th Century, resulting in rural districts' being substantially overrepresented. When Leadership refused, Mr. Davis played a substantial role in the Tennessee case of *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W.2d 40 (Tenn. 1956), in which he was one of the counsel of record. When the Tennessee Supreme Court concluded that this was a political question and declined to grant relief, he was active in pursuing the federal court case that culminated in this Court's decision in *Baker v. Carr*, 369 U.S. 186 (1962), the seminal case standing for the principle of "one person, one vote," cited numerous times in *Reynolds v. Sims*, 377 U.S. 533 (1964), and in countless other cases. Mr. Davis, as a scholar on this subject, fervently believes that the principles of *Baker* and *Reynolds* must be upheld in this case.

The Judicial Education Project (JEP) is a national, non-profit educational institution dedicated to strengthening liberty and justice through defending the Constitution as envisioned by the Framers—a federal government of defined and limited powers, dedicated to the rule of law, and supported by a fair and impartial judiciary. JEP educates citizens about these constitutional principles and focuses on issues such as the judiciary's role in our democracy, how judges interpret the Constitution, and the impact of court rulings on the nation. JEP's educational efforts are

conducted through various outlets, including print, broadcast, and internet media. JEP has filed amicus briefs in numerous cases in this Court and in the federal courts of appeals, including this Court's 2013 case *Shelby County v. Holder*.

SUMMARY OF ARGUMENT

Fifty years ago, in a case arising out of Tennessee, this Court laid down the foundational principle of one-person, one-vote. Representative democracy required as much. State legislatures, this Court wrote, serve as the "fountainhead of representative government in this Country." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964). For "[l]egislators represent people, not trees or acres." They "are elected by voters, not farms or cities or economic interests." *Id.*

This Court's earliest one-person, one-vote cases addressed the urban-rural imbalance created by urban migration and decades of inaction that served the status quo. Despite large population shifts from the rural to urban areas, legislatures ordinarily did nothing to reapportion voting districts. As a result, the votes of urban citizens were diluted. A series of cases from this Court changed all of that: Under one-person, one-vote, States were required to apportion districts based on population data. But as this case shows, relying exclusively on population data may give rise to its own gerrymandering concerns.

The urban-rural imbalance has now come full circle. Because many states, like Texas, rely exclusively on population data, rather than looking

to the number of eligible voters, in drawing district lines, it is now rural voters whose votes are particularly susceptible to dilution. The temptation for state legislators to maintain the status quo has hardly diminished in the last half century.

The district court's determination that the method of population apportionment is wholly unreviewable leaves officials with unfettered discretion to dilute the votes of some citizens based solely on geography. But this Court has been clear that where one lives is not a permissible basis for vote debasement. Indeed, apportioning in a manner that substantially overweights the votes of some and underweights the votes of others is as unconstitutional as not reapportioning at all.

ARGUMENT

Exclusive Reliance on Total Population to Apportion Districts May Unconstitutionally Dilute the Votes of Rural Citizens.

This Court's cases make clear that the one-person, one-vote rule protects eligible voters from vote dilution. The fundamental right to vote does not vary based on geography. Rather, the Equal Protection Clause ensures that "the vote of any citizen is approximately equal in weight to that of any other citizen in the State" regardless of where that citizen resides. *Reynolds*, 377 U.S. at 579. Thus, this Court has time and again held that a citizen's right to vote "is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State." *Id.* at 568.

This principle is long-standing. In *Baker v. Carr*, this Court started from the premise that "[a] citizen's right to a vote free from arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution...." 369 U.S. at 208. In *Gray v. Sanders*, the Court explained that: "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications." 372 U.S. 368, 379-80 (1963).

Indeed, the very foundation of our democracy is at stake. As the *Reynolds* Court put it: "Full and effective participation by all citizens in state government requires ... that each citizen have an equally effective voice in the election of members of his state legislature." 377 U.S. at 565.

A. Early one-person, one-vote cases involved regional battles pitting underrepresented urban interests against rural interests.

It is nothing new for this Court's one-person, one-vote cases to address political power imbalances between regions of States. Historically, these power imbalances have seen rural state legislators concentrate political power by failing to reapportion and thereby diluting the votes of urban citizens.

In early cases, this Court held unconstitutional the voter dilution resulting from the prolonged failures to redraw districts. The States' refusal to redraw districts—for decades—gave power to rural interests that were quite happy to preserve the status quo. For years, the courts stayed out of the fight too. *See, e.g.*, *Colegrove v.*

Green, 328 U.S. 549 (1946). The results were unacceptable. As this Court observed, "Legislative inaction, coupled with the unavailability of any political or judicial remedy, had resulted in ... a minority strangle hold on the State Legislature." *Reynolds*, 377 U.S. at 570.

In Tennessee, for example, by the 1950s, the Tennessee General Assembly had not reapportioned its districts since doing so after the 1900 census. That left Representatives and Senators from rural districts with undue power in the wake of the massive migrations to more urban districts during those 50 years. Rural legislators were determined to hold on to that power, and refused pleas from urban legislators to reapportion. Appeals pointing to the Tennessee Constitution, which requires decennial reapportionment and provides that the houses shall be apportioned based on qualified voters, fell on deaf ears.[2] A lawsuit was filed in state court, but the Tennessee Supreme Court's refused to grant relief in *Kidd v. McCanless*, 200 Tenn. 273, 292 S.W.2d 40 (Tenn. 1956).

Underrepresented voters then turned to the federal courts, initiating *Baker v. Carr*. The Plaintiffs in that case were from Davidson (Nashville), Hamilton (Chattanooga), Knox (Knoxville), Montgomery (Clarksville), and Shelby (Memphis) Counties.[3] They complained that the

---

[2] TENN. CONST. Art. II, §§ 5 and 6 (1870).

[3] In 1950, Davidson, Hamilton, Knox, and Shelby Counties were the most populated in the State, and Montgomery County had more population than many others. *See*

continued application of the 1901 Apportionment Act, notwithstanding the growth of Tennessee's population and its changing distribution, violated the Equal Protection Clause of the Fourteenth Amendment. This Court held that the *Baker* Plaintiffs, with the support of the U.S. Department of Justice, had stated a justiciable claim and that they had standing to make it. 369 U.S. at 197-98.

More to the point, the *Baker* Plaintiffs lived in metropolitan areas and complained that the 1901 Apportionment Act favored the interests of smaller, rural counties. "[A] single vote in Moore County, Tennessee, [wa]s worth 19 votes in Hamilton County, that one vote in Stewart or Chester County [wa]s worth nearly eight times a single vote in Shelby or Knox County." 369 U.S. at 245 (Douglas, J., concurring); s*ee also* 369 U.S. at 253 (Clark, J., concurring)("[I]t appears from the record that 37% of the voters of Tennessee elect 20 of the 33 Senators while 40% of the voters elect 63 of the 99 members of the House.").

Gray v. Sanders also involved a complaint of urban vote dilution. Fulton County (Atlanta) voters argued that rural interests were overrepresented in the vote-counting system used in primary elections for statewide offices. In response, Georgia claimed that its apportionment system was designed "to achieve a reasonable balance as between urban and rural electoral power." 372 U.S. at 370. In effect, however, it had the opposite result, diluting the votes cast in Atlanta and other urban areas. Faced

---

http://www.census.gov/population/cencounts/tn190090.txt (last viewed August 3, 2015).

with this scenario, the Court asked, "How ... can one person be given twice or ten times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?" *Id.* at 379. Its answer: "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote ... wherever their home may be in that geographical unit." *Id.* Because the stem operated on a statewide basis, voting power had to be equalized across the board.

In *Wesberry v. Sanders*, this Court addressed a vote dilution challenge to Georgia's congressional redistricting plan, which was then more than 30 years old. Underrepresented voters from the Fifth District, which included Atlanta and Fulton County, complained that, while the Fifth had a total population of 823,680, the average for the ten districts was 394,312, and the Ninth had only 272,154 people. 376 U.S. at 2. This Court found that "the 1931 Georgia apportionment grossly discriminates against voters in the Fifth Congressional District." *Id.* at 7.

Reynolds v. Sims was this Court's fourth urban vote dilution case in three years, and it signaled this Court's growing impatience with unequal apportionment and the importance it placed on one-person, one-vote. Plaintiffs from three of the largest Alabama counties and the fifth largest complained that the county-based system of allocating seats in the Alabama Legislature violated their constitutional rights by diluting the voting

rights of urban voters.[4] 377 U.S. at 541. This Court agreed: "Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as invidious discriminations based on factors such as race." *Id.* at 566; *see also id.* at 563 ("Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable."). Indeed, "[t]o say that a vote is worth more in one district than in another . . . run[s] counter to our fundamental ideas of democratic government." *Id.* at 563-64 (quotation omitted).

Fifty years later, the legacy of one-person, one-vote continues: It is still true that citizens' votes must not be diluted "merely because of where they happen to reside." *Reynolds*, 377 U.S. at 563. The early one-person, one-vote cases involved claims by urban voters that their votes were diluted by the weight given to rural interests. Today, because of apportionment plans like the Texas Senate Plan, it is rural voters whose fundamental rights are most in jeopardy.

---

[4] In 1960, Jefferson County was the most populated county in Alabama, Mobile the second-most, and Etowah the sixth-most. *See* http://www.census.gov/population/cencounts/al190090.txt (last viewed August 3, 2015).

B. Exclusive reliance on total population to the exclusion of actual or potential voters can create the same problems that this Court confronted some 50 years ago.

1. The exclusive use of total population apportionment mandated by the Texas Senate Plan results in vote dilution.

Under Plan 172, the plan challenged here, the history of one-person, one-vote districting has come full circle: The votes of rural citizens are underweighted based solely on their place of residence. This the Constitution does not permit.

The Evenwel Appellants have shown that using total population as the basis for drawing Senate districts in Texas overpopulates some districts with voters and packs other districts with people ineligible to vote. They live in Senate districts in which the citizen voting age population, the total voter registration, and the non-suspense voter registration figures range from 173,161 to 215,567 people more than the least populated Senate district for SD 1 and between 148,030 and 175,836 people more than the least populated Senate district for SD 4. Br. of Appellants at 11-12. The effect is to dilute the votes of the Evenwel Appellants making one vote from the underpopulated districts worth between 1.54 and 1.84 votes in SD 1 and between 1.41 and 1.61 votes in SD 4. Br. of Appellants at 11-12.

These deviations—ranging from 30% to 50%, Br. of Appellants at 18—are well in excess of those

this Court has found acceptable. While "[m]athematical exactness or precision" is not required to satisfy one-person, one-vote standards for state legislative districts, *Reynolds*, 377 U.S. at 577, deviations approaching 20% are per se unconstitutional. *See Mahan v. Howell*, 410 U.S. 315, 329 (1973).

This appeal, moreover, shows that the underpopulated districts are urban and the overpopulated districts are rural. Appellant Evenwel lives in Titus County in rural northeast Texas, and Appellant Pfenninger lives in Montgomery County north of Houston. *See* J. S. App. D, at 19a-20a, ¶¶ 6, 7. They allege that their districts are overpopulated in terms of citizen voting-age population, total voter registration, and non-suspense voter registration. *Id.* at 27a-30a. In contrast, the districts that are underpopulated with voters are largely urban or suburban, and three of the five most underpopulated are in Houston.

2. The exclusive use of total population apportionment has resulted in vote dilution in other places and for plans other than the Texas Senate Plan.

Vote dilution claims like those of the Evenwel Appellants can arise anywhere that eligible voters and non-eligible persons are not evenly distributed. One might reasonably assume that there are more non-eligible persons in urban areas than there are in rural areas simply because there are more people in urban areas. But the problem can be a local one involving county commissions or municipal districts, and legislators may be tempted to use more

sophisticated methods to underweight some votes intentionally, while intentionally overweighting others.

In *Chen v. City of Houston*, 206 F. 3d 502 (5th Cir. 2000), for example, the Fifth Circuit found that Houston districts overweighted some voters while underweighting others. "[U]sing CVAP figures," the Court wrote, "it is clear that several Houston districts fall outside the ten percent threshold established as a safe-harbor for population variance in municipal election districts." *Id.* at 522.

Similar claims were directed at the City of Irving, Texas. There, the difference between total population and voting age population in the city council districts was not uniform. *See* Pet. For Cert. at 9, *Lepak v. City of Irving*, No. 12-777. Instead, while the total population for District 1 was 31,642, its voting-age population was 20,930, and its citizen voting-age population was only 11,231. *Id.* In contrast, the most populated District, District 5, had a total population of 33,126, a voting-age population of 26,000, and a citizen voting age population of 19,673. *Id.* As a result, District 5 had a total population that was greater than that of District 1 by 1,484, but its voting-age population was 5,070 greater, and its citizen voting-age population was 8,442 larger.

In *Garza v. County of Los Angeles*, a low overall deviation of 0.68 nonetheless did not yield balanced county commission districts. *See* 918 F. 2d 763, 773 (9th Cir. 1990). As Judge Kozinski noted, in a separate opinion, "[T]he supervisor from District 1 can be elected on the basis of 353,826 votes ..., while

the supervisor from District 3 requires at least 549,332 votes." *Id.* at 780 (Kozinski, J., concurring in part and dissenting in part). In other words, "a vote cast in District 1 counts for almost twice as much as a vote cast in District 3." *Id.*

In *Gray v. Sanders*, Georgia defended its use of a system that favored rural counties and voters in statewide primaries for state office, claiming that the system was designed "to achieve a reasonable balance as between urban and rural electoral power." 372 U.S. at 370. This Court quashed that notion, but Georgia returned to the well in its 2001 and 2002 legislative redistricting plans. A three-judge federal district court found that, even though the overall deviation in the House and Senate plans was less than 10%, the plans were an unconstitutional exercise of political gerrymandering. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.), *aff'd sub nom. Cox v. Larios*, 542 U.S. 947 (2004). The district court concluded that the plans implemented "a deliberate and systematic policy of favoring rural and inner-city interests at the expense of suburban areas north, east, and west of Atlanta." 300 F. Supp. 2d at 1327.

In short, the exclusive use of total population to apportion can result and has resulted in vote dilution in state, municipal, and county commission districts around the country. The district court's failure to look behind the veil of total population apportionment leaves entirely unchecked official attempts to gerrymander elections. Of course, the urge to protect regional districts in redistricting has not disappeared in the last fifty years. As a result,

"[o]ne must be ever aware that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.'" *Reynolds*, 377 U.S. at 563 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

3. The exclusive use of total population apportionment may result in vote dilution in Tennessee.

Tennessee took *Baker's* mandate and the principle of one-person, one-vote to heart. The General Assembly and the state courts have conscientiously applied these rules. *See, e.g., State v. Crowell*, 631 S.W.2d 702 (Tenn. 1982). Tennessee amici believe that legislatures should be apportioned in a way that complies with this Court's precedents. If the district court's ruling in this case, and others like it, are allowed to stand, Tennessee's rural voters could find themselves just as underrepresented as the State's urban voters were before *Baker*. All that would take would be for drafters inclined toward regional gerrymandering to pack favored districts with non-eligible persons.

In a State like Tennessee, amici believe that the use of total population has thus far produced a legislature that accommodates both rural and urban interests. However, they fear that, if the use of total population is not subject to some constraint, future legislative plans can be tilted toward urban areas through the artful use of non-eligible persons. The effect would be to favor urban interests or rural. *Cf.* Matthew D. McCubbins, *Congress, the Courts, and Public Policy: Consequences of the One Man, One Vote Rule*, 32 Am. J. of Pol. Sci. 388 (1988) (identifying "one of the biggest policy stories of the

past two decades" as "the continuing reallocation of federal policy benefits from rural to nonrural Americans" and finding it attributable "in part" to court-ordered congressional redistricting). Neither the Tennessee Legislature nor any other representative body should be permitted to restrict itself to using only total population figures in apportioning districts, particularly when the deviations are as large as those in the Texas Senate Plan.

* * *

This case offers this Court the opportunity to refine its one-person, one-vote jurisprudence to clarify that rural vote dilution is no more acceptable than urban vote dilution. *Reynolds v. Sims* explained that "A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm." 377 U.S. at 568. It is time for the Court to provide reasonable population parameters to ensure that this is so.

CONCLUSION

This Court should reverse the judgment of the U.S. District Court for the Western District of Texas and remand the case for further proceedings on the merits.

Respectfully submitted,

John J. Park, Jr.
Counsel of Record for Amicus Curiae
Strickland Brockington Lewis LLP
1170 Peachtree Street NE, Suite 2200
Atlanta, GA 30309
678.347.2208
jjp@sbllaw.net

Linda Carver Whitlow Knight
Gullett, Sanford, Robinson & Martin PLLC
Suite 1700
150 Third Avenue South
Nashville, TN 37201
615-244-4994
lknight@gsrm.com

Carrie Severino
Jonathan Keim
Judicial Education Project
722 12th St. NW, Fourth Floor
Washington, DC 20005
(571) 357-3134

Erin Morrow Hawley
University of Missouri School of Law
212 Hulston Hall
Columbia, MO 65211

Supreme Court, U.S.
FILED
SEP 24 2015
OFFICE OF THE CLERK

No. 14-940

In The
Supreme Court of the United States

SUE EVENWEL, ET AL.,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

BRIEF OF THE TEXAS SENATE HISPANIC CAUCUS AND THE TEXAS HOUSE OF REPRESENTATIVES MEXICAN AMERICAN LEGISLATIVE CAUCUS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

NINA PERALES
Counsel of Record
THOMAS A. SAENZ
JOHN PAUL SALMON
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
nperales@maldef.org

Counsel for Amici Curiae

September 25, 2015

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES vi

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Apportionment Metrics Sought by Plaintiffs Shift Legislative Seats Away From Texas's Two Largest Cities and South and West Texas 3

A. Texas Is One of the Most Demographically Diverse States in the Nation 4

1. Children in Texas 6

2. Adult Non-citizens in Texas 8

3. Eligible Individuals Who Are Not Yet Registered to Vote 9

4. Registered Voters Who Do Not Vote 10

B. The Metrics Advanced by Plaintiffs Shift Districts Across the State and Create Grossly Overpopulated Districts 11

1. The Texas Senate Map and Plaintiffs' Metrics 11

2. The Texas House Map and Plaintiffs' Metrics 15

TABLE OF CONTENTS – Continued

Page

C. The Loss of Legislative Seats, and the Creation of Super-sized Districts, Will Injure Constituents and Elected Representatives 17

II. Plaintiffs' Claim to an "Equally Weighted Vote" Is Illusory and Cannot Form the Basis of an Equal Protection Claim 19

A. As a Practical Matter, the "Weight" of Votes Cannot Be Equalized 21

B. Apportionment Based on Voter Eligibility Metrics Such as CVAP or Registered Voters Creates Bizarre Results and Does Not Equalize the Weight of Votes 23

1. The Texas Senate Plan and CVAP 23

C. Equalization of Both Total Population and Voters Cannot Be Achieved 26

1. Plaintiffs' Complaint Asserts Dual Constitutional Mandates..... 26

2. Plaintiffs Tiptoe Away from Dual Mandates But Continue to Assert that Both Total Population and Voters Can Be Equalized..... 27

3. Both Total Population and Voters Cannot Be Equalized Across Texas Senate Districts 29

TABLE OF CONTENTS – Continued

Page

4. Both Total Population and Voters Cannot Be Equalized Across Texas House Districts 33

5. Plaintiffs' Dual-Mandate Standard Should Be Rejected Because the Court Does Not Impose Impossible Standards 36

III. The Current Effort to Reduce Latino Representation Through Apportionment Follows a Long History of Voting Discrimination in Texas 36

IV. The Effect of Shifting Political Representation to More Homogenous Communities Will Be Fewer Policy Proposals and Less Enacted Legislation Addressing the Needs of Diverse Communities in Urban Areas and in South and West Texas 41

A. Past Legislative Accomplishments May Never Have Been Achieved 41

B. Harmful Legislation May Be Imposed if Large, Diverse Communities Are Underrepresented 42

CONCLUSION 44

TABLE OF CONTENTS – Continued

Page

TABLE OF APPENDICES

Plan S172: Map of District Variations in VAP ..... App. 1

Plan S172: Map of District Variations in CVAP .... App. 2

Plan S172: Map of District Variations in VR ..... App. 3

Plan S172: Map of District Variations in Votes Cast ..... App. 4

Plan S172: Map of Current Texas Senate Districts ..... App. 5 (back of sheet)

Plan S173: Map of Texas Senate Districts Equalized by CVAP ..... App. 6

Plan S174: Map of Texas Senate Districts Equalized by VR ..... App. 7

Plan H358: Map of Current Texas House Districts ..... App. 8

Map of County Apportionment of House Seats by CVAP – Dallas Region ..... App. 9

Map of County Apportionment of House Seats by CVAP – Houston Region ..... App. 10

Plan H358: Map of District Variations in CVAP .... App. 11

Plan H358: Map of Latino Majority Districts .... App. 12

Plan S172: District Population Analysis, Page One ..... App. 13

Plan S172: Hispanic Population Profile ..... App. 14

Plan S172: Population and Voter Data and VR Comparison ..... App. 15

TABLE OF CONTENTS – Continued

Page

Plan S173: District Population Analysis, Page One ..... App. 17

Plan S173: Hispanic Population Profile ..... App. 18

Plan S173: Population and Voter Data with VR Comparison ..... App. 19

Plan S174: District Population Analysis, Page One ..... App. 21

Plan S174: Hispanic Population Profile ..... App. 22

Plan S174: Population and Voter Data with VR Comparison ..... App. 23

Plan H358: District Population Analysis, Page One ..... App. 25

Plan H358: Hispanic Population Profile ..... App. 26

Plan H358: Population and Voter Data with VR Comparison ..... App. 31

TABLE OF AUTHORITIES

Page

CASES

Ala. Leg. Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) 36

Brown v. Thomson, 462 U.S. 835 (1983) 29

Burns v. Richardson, 384 U.S. 73 (1966) 21

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2002) 27

Gaffney v. Cummings, 412 U.S. 735 (1973) 20

Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972) 39

Harper v. Vir. Bd. of Elections, 383 U.S. 663 (1966) 37, 38

Karcher v. Daggett, 462 U.S. 725 (1983) 29

Lucas v. Colo. Gen. Assembly, 377 U.S. 713 (1964) 34

LULAC v. Perry, 548 U.S. 399 (2006) 37, 40

Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964) 33

Perez v. Texas, No. 11-CA-360-OLG-JES-XR, slip op. (W.D. Tex. Mar. 19, 2012) 39

Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994) 37

White v. Regester, 412 U.S. 755 (1973) 15, 20, 21, 38, 39

Zivotofsky v. Clinton, 132 S. Ct. 1421 (2012) 28

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Tex. Const. art. III, § 2 11

Tex. Const. art. III, § 25 11

Tex. Const. art. III, § 26 15

Act of May 22, 2013, 83d Leg., R.S., ch. 726, 2013 Tex. Gen. Laws 1846 42

Tex. S.B. 185, 84th Leg., R.S. (2015) 43

S. Res. 39, 84th Leg., R.S, 2015 S.J. of Tex. 50 43

Tex. S. Rule 5.13 43

Tex. S. Rule 16.07 43

OTHER AUTHORITIES

Julian Aguilar, *With Clock Running, Immigration Bills Cling to Senate Calendar*, Tex. Tribune, May 19, 2015 43

Dallas Public Library, Voting Rights: The Poll Tax, Marion Butts Collection 38

O. Douglas Weeks, Tex. State Historical Ass'n, Election Laws, Handbook of Texas Online (2010) 38

Letter from U.S. Dep't of Justice to Tex. Sec'y of State (Jan. 1976) 39

Letters from U.S. Dep't of Justice to Tex. Sec'y of State (Jan. 25, 1982) 39

Letter from U.S. Dep't of Justice to Tex. Sec'y of State (Nov. 12, 1991) 39

TABLE OF AUTHORITIES – Continued

Page

Letter from U.S. Dep't of Justice to Tex. Sec'y of State (Nov. 16, 2001) 39

Mex. Am. Legal Def. and Educ. Fund, Map of County Apportionment of House Seats by CVAP – Dallas Region (2015) 16

Mex. Am. Legal Def. and Educ. Fund, Map of County Apportionment of House Seats by CVAP – Houston Region (2015) 16

Mex. Am. Legal Def. and Educ. Fund, Plan H358: Map of District Variation in CVAP (2015) 35

Mex. Am. Legal Def. and Educ. Fund, Plan S172: Map of District Variation in CVAP (2015) 31

Mex. Am. Legal Def. and Educ. Fund, Plan S172: Map of District Variation in Votes Cast (2015) 31

Mex. Am. Legal Def. and Educ. Fund, Plan S172: Map of District Variation in Voting-Age Population (2015) 19, 31

Mex. Am. Legal Def. and Educ. Fund, Plan S172: Map of District Variation in Voter Registration (2015) 31

Office of the Governor Greg Abbott, Fortune 500 Companies in Texas (2015) 4

Pew Research Ctr., Statistical Portrait of the Foreign-Born Population in the United States, 2012, Table 13 (2014) 8

TABLE OF AUTHORITIES – Continued

Page

Tex. Dep't of State Health Serv., The Health Status of Texas (2014) 41

Tex. Legislative Council, Plan H358: District Population Analysis (2015) 15

Tex. Legislative Council, Plan H358: Hispanic Population Profile (2015) 15, 16, 17, 35

Tex. Legislative Council, Plan H358: Map of Current Texas House Districts (2014) 35

Tex. Legislative Council, Plan H358: Population and Voter Data with Voter Registration Comparison (2015) 15, 16

Tex. Legislative Council, Plan S172: 2012 General Election Analysis (2013) 10, 21

Tex. Legislative Council, Plan S172: 2014 General Election Analysis (2015) 6, 9, 10, 21

Tex. Legislative Council, Plan S172: District Population Analysis (2015) 11, 29, 32

Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015) ..... *passim*

Tex. Legislative Council, Plan S172: Map of Current Texas Senate Districts (2014) 18, 34

Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015) ..... *passim*

Tex. Legislative Council, Proposed Plan S173: District Population Analysis (2015) 14, 32

TABLE OF AUTHORITIES – Continued

Page

Tex. Legislative Council, Proposed Plan S173: Hispanic Population Profile (2015) 13, 14

Tex. Legislative Council, Proposed Plan S173: Map of Texas Senate Districts Equalized by CVAP (2015) 12, 18, 32

Tex. Legislative Council, Proposed Plan S173: Population and Voter Data with Voter Registration Comparison (2015).....12, 13, 14, 32, 33

Tex. Legislative Council, Proposed Plan S174: District Population Analysis (2015) 14, 32

Tex. Legislative Council, Proposed Plan S174: Hispanic Population Profile (2015) 14

Tex. Legislative Council, Proposed Plan S174: Map of Texas Senate Districts Equalized by Voter Registration (2015).....32

Tex. Legislative Council, Proposed Plan S174: Population and Voter Data with Voter Registration Comparison (2015).....14, 32, 33

Tex. Legislative Council, State and Federal Law Governing Redistricting in Texas (2011) 15

Tex. Legislative Council, State House Districts 1982-1984 Elections (2010).....16

Tex. Legislative Council, State Senate Districts 1982 Election (2010) 40

Tex. Sec'y of State, 2008 General Election Race Summary Report (2008) 22

Tex. Sec'y of State, 2010 General Election Race Summary Report (2010) 22

TABLE OF AUTHORITIES – Continued

Page

Tex. Sec'y of State, Voter Registration and Unofficial Early Voting Figures (2014) 16

The Federalist No. 10 (James Madison).....42

Adie Tomer and Joseph Kane, *The Top 10 Metropolitan Port Complexes in the U.S.*, Brookings (July 1, 2015).....4

U.S. Bureau of Labor Statistics, Dallas-Fort Worth Area Employment – July 2015 (2015).....4

U.S. Census Bureau, 2010 Census Summary File 1 (2011).....7

U.S. Census Bureau, American FactFinder, 2014 Population Estimate (2014).....18

U.S. Census Bureau, Metropolitan Statistical Areas; and for Puerto Rico, 2014 Population Estimates (2014) 41

U.S. Census Bureau, 2013 Small Area Income and Poverty Estimates (2013) 41

U.S. Census Bureau, Table 4a: Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2002 (2002).....5

U.S. Census Bureau, Table 4b: Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2014 (2014) 5, 9

U.S. Census Bureau, Table 5: Reported Voting and Registration, by Age, Sex, and Educational Attainment: November 2014 (2014) 10

TABLE OF AUTHORITIES – Continued

Page

U.S. Census Bureau, Table Viewer: Average Family Size by Age (Hispanic or Latino Householder), 2010 Census (2010) 7

U.S. Census Bureau, Table Viewer: Average Family Size by Age (White Alone, Not Hispanic or Latino Householder), 2010 Census (2010) 7

U.S. Census Bureau, Table Viewer: Sex by Age by Nativity and Citizenship Status, 2014 American Community Survey 1-Year Estimates (2014) 5, 8

U.S. Census Bureau, Table Viewer: Sex by Age by Nativity and Citizenship Status (Hispanic or Latino), 2014 American Community Survey 1-Year Estimates (2014) 5

U.S. Census Bureau, Texas: People QuickFacts (Aug. 31, 2015) 4, 5, 6

U.S. Census Bureau, Voting Age Population by Citizenship and Race (CVAP), 2009-2013 American Community Survey (2013) 16

U.S. Dep't of Homeland Sec., U.S. Naturalizations: 2013 (2014) 9

INTEREST OF AMICI CURIAE[1]

Established in 1987, the Senate Hispanic Caucus is comprised of all Hispanic Texas State Senators and those Senators who represent districts with large minority populations. The goals of the Senate Hispanic Caucus include promoting legislative initiatives that better the Texas Hispanic community, particularly in the areas of economic development, health, education, civic engagement and civil rights. The members of the Senate Hispanic Caucus advance its mission through introducing, educating Senators about, and voting in support of legislation that benefits the Latino community in Texas, as well as voting against legislation that harms the Latino community. Members of the Senate Hispanic Caucus live in demographically diverse districts that will suffer severe negative effects from adoption of the apportionment metrics urged by Plaintiffs, including loss of constituent representation and diminished regional presence in the Legislature.

The Mexican American Caucus (MALC) was founded in 1973 in the Texas House of Representatives for

---

[1] Pursuant to Rule 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amici curiae, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

the purpose of strengthening the numbers of Latino House members and better representing a united Latino constituency across the state. MALC is the oldest and largest Latino legislative caucus in the United States. MALC has a membership of 39 House members from all parts of the state, and MALC members vote as a bloc on consequential matters for Latino constituents, including voting rights. Members of MALC live in demographically diverse districts that will suffer severe negative effects from the adoption of the apportionment metrics urged by Plaintiffs, including loss of constituent representation and diminished regional presence in the Legislature.

SUMMARY OF ARGUMENT

The apportionment metrics advanced by Plaintiffs would strip state legislative seats out of Houston, Dallas and South and West Texas and create grossly oversized districts of up to one million people. In addition, Plaintiffs' apportionment metrics would have disastrous effects on the Latino community because the metrics are tied to demographic characteristics, such as youth and lower rates of voter registration, that are most closely associated with Latinos.

Subtracting predominantly Latino population from apportionment in Texas will shift seats towards more heavily Anglo and older population in Central and East Texas. This radical change in apportionment

and representation will harm the voters who live in communities with significant Latino populations, whether or not those voters are themselves Latino. Packed into super-sized legislative districts, voters and their non-voting children and neighbors will be forced to compete with a vast number of other constituents for state resources and responsive legislation. Elected representatives without the resources or capacity to tend to the needs of hundreds of thousands more constituents will strain to the breaking point. For the Latino community in particular, which has struggled to gain the opportunity to elect their candidates of choice, apportionment based on citizen-voting-age population (CVAP) or registered-voter population would eliminate opportunity districts and subtract decades of progress from the Texas redistricting maps.

ARGUMENT

I. The Apportionment Metrics Sought by Plaintiffs Shift Legislative Seats Away From Texas's two Largest Cities and South and West Texas

The great diversity of Texas is mirrored in its largest cities. People of all races and backgrounds mix together in the state's economic and cultural hubs. Houston, the largest city in Texas, is home to 25 Fortune 500 corporations, including some of the

nation's largest energy companies.[2] The Dallas metropolitan area is the fourth-largest employment center in the nation with more than three million jobs.[3] Texas is also diverse in it South and West Texas regions, which include agricultural areas as well as cities. South and West Texas are home to the largest inland ports along the U.S.-Mexico border – crossing billions of dollars in goods annually.[4] Subtracting millions of children and others not yet eligible or registered to vote from the apportionment base skews legislative districts away from the source of much of the state's economic success.

A. Texas Is One of the Most Demographically Diverse States in the Nation

From 2010 to 2014, Texas's population grew 7%, compared to 3% overall for the United States.[5] Texas's population is younger than the national average;

---

[2] Office of the Governor Greg Abbott, Fortune 500 Companies in Texas (2015), http://gov.texas.gov/files/ecodev/Fortune_500.pdf.

[3] U.S. Bureau of Labor Statistics, Dallas-Fort Worth Area Employment – July 2015 (2015), http://www.bls.gov/regions/southwest/news-release/AreaEmployment_DallasFortWorth.htm.

[4] Adie Tomer and Joseph Kane, *The Top 10 Metropolitan Port Complexes in the U.S.*, Brookings (July 1, 2015), http://www.brookings.edu/blogs/the-avenue/posts/2015/07/01-top-10-metro-ports-tomer-kane.

[5] U.S. Census Bureau, Texas: People QuickFacts (Aug. 31, 2015), http://quickfacts.census.gov/qfd/states/48000.html.

more than one-quarter of Texans are under age 18.[6] Texas is 44% Anglo, 39% Latino, 12.50% African American, and 4.50% Asian American.[7]

The composition of the Texas electorate is also changing. Latinos have slowly increased their registration rates over time and in November 2014 constituted 23% of Texas registered voters.[8] Today, 47% of native-born Texas children are Latino; these young people will become eligible to vote as they turn 18.[9]

Texas's population, however, is unevenly distributed. In Plaintiffs' Senate Districts 1 and 4, the residents are, on average, slightly older and less

---

[6] *Id.*

[7] *Id.* The term "Anglo" refers to persons who identify to the U.S. Census Bureau as White and not Hispanic.

[8] *See* U.S. Census Bureau, Table 4b: Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2014 (2014), http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2014/tables.html; U.S. Census Bureau, Table 4a: Reported Voting and Registration of the Total Voting-Age Population, by Sex, Race and Hispanic Origin, for States: November 2002 (2002), http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2002/tab04a.pdf.

[9] *See* U.S. Census Bureau, Table Viewer: Sex by Age by Nativity and Citizenship Status, 2014 American Community Survey 1-Year Estimates (2014), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_B05003&prodType=table (limit geography to Texas); U.S. Census Bureau, Table Viewer: Sex by Age by Nativity and Citizenship Status (Hispanic or Latino), 2014 American Community Survey 1-Year Estimates (2014), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_B05003I&prodType=table (limit geography to Texas).

racially diverse than state averages.[10] Senate Districts 1 and 4 are 67% and 63% Anglo, respectively, although Texas on the whole is 44% Anglo.[11] Less than one in ten registered voters in Senate Districts 1 and 4 is Latino.[12] The voter turnouts in Senate Districts 1 and 4 are also slightly higher at 37% than the statewide average of 34%.[13]

1. Children in Texas

Texas children constitute the largest number of persons ineligible to vote in the state – 7,040,918.[14] Compared to older age brackets, Texas children are also disproportionately Latino.[15]

Race and ethnicity play a strong role in the distribution of children across Texas. In Texas, the average Anglo family contains 0.8 children and 2.14

---

[10] *See* Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15.

[11] *Id.*; U.S. Census Bureau, Texas: People QuickFacts (Aug. 31, 2015), http://quickfacts.census.gov/qfd/states/48000.html.

[12] Tex. Legislative Council, Plan S172: 2014 General Election Analysis (2015), ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED206_2014G_Statewides.pdf.

[13] Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15.

[14] U.S. Census Bureau, Texas: People QuickFacts (Aug. 31, 2015), http://quickfacts.census.gov/qfd/states/48000.html.

[15] *See id.*

adults.[16] The average Latino family contains 1.49 children and 2.38 adults.[17] Texas House and Senate districts containing the greatest percentages of families living with children tend to be in areas with high Latino populations. For example, according to the 2010 Census, the state Senate districts with the highest percentages of families living with children were in Houston and along the Texas-Mexico border.[18] Eight of the ten state House districts with the highest percentage of families living with children were also in Houston and along the Texas-Mexico border.[19]

The child population varies so widely across Texas Senate and House districts that simply using voting-age population as an apportionment metric renders the current plans malapportioned on that metric.[20] In fact, the main source of Plaintiffs' claimed

---

[16] U.S. Census Bureau, Table Viewer: Average Family Size by Age (White Alone, Not Hispanic or Latino Householder), 2010 Census (2010), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_P37I&prodType=table (limit geography to Texas).

[17] U.S. Census Bureau, Table Viewer: Average Family Size by Age (Hispanic or Latino Householder), 2010 Census (2010), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_SF1_P37H&prodType=table (limit geography to Texas).

[18] *See* U.S. Census Bureau, 2010 Census Summary File 1 (2011) (calculated from Tables P17, P18, P34, P37, and P38).

[19] *Id.*

[20] *See, e.g.*, Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 (ideal voting-age population: 589,669; District 27 voting-age

(Continued on following page)

"imbalance" in voter eligibility across the state is due to the presence of children, and specifically the relatively large number of children who are Latino.

2. Adult Non-citizens in Texas

Adult non-citizens in Texas constitute a much smaller population than children. According to the U.S. Census Bureau, 2,685,393 adult non-citizens live in Texas.[21] Although adult non-citizens constitute less than 8% of the Texas population, the majority of adult non-citizens in Texas are Latino and tend to live in Latino communities.[22] Thus, excluding adult non-citizens from apportionment exacerbates the effect on Latino communities of excluding children.

---

population deviation from ideal: -11.12%; District 3 voting-age population deviation from ideal: 8.77%).

[21] U.S. Census Bureau, Table Viewer: Sex by Age by Nativity and Citizenship Status, 2014 American Community Survey 1-Year Estimates (2014), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_B05003I&prodType=table (limit geography to Texas).

[22] Pew Research Ctr., Statistical Portrait of the Foreign-Born Population in the United States, 2012, Table 13 (2014), http://www.pewhispanic.org/2014/04/29/statistical-portrait-of-the-foreign-born-population-in-the-united-states-2012/; U.S. Census Bureau, Table Viewer: Sex by Age by Nativity and Citizenship Status, 2014 American Community Survey 1-Year Estimates (2014), http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_14_1YR_B05003I&prodType=table (limit geography to Texas).

Adult non-citizens include individuals with a mix of immigration statuses, including legal permanent residents, visa-holders, and the undocumented. Many adult non-citizens, although not currently able to vote, are eligible to naturalize; each year, more than 50,000 Texans become naturalized U.S. citizens.[23]

3. Eligible Individuals Who Are Not Yet Registered to Vote

In Texas, approximately 2.1 million U.S. citizens of voting age are not registered to vote.[24] Although eligible, these individuals have either never registered or fallen off the rolls after changing address and not updating their voter-registration information.

Here too, race and ethnicity drive regional differences. Latino voter registration lags Anglo voter registration by 17 percentage points.[25] Factors contributing to lower rates of voter registration among

---

[23] U.S. Dep't of Homeland Sec., U.S. Naturalizations: 2013 (2014), http://www.dhs.gov/sites/default/files/publications/ois_natz_fr_2013.pdf.

[24] *See* Tex. Legislative Council, Plan S172: 2014 General Election Analysis (2015), ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED206_2014G_Statewides.pdf (total voter registration: 14,047,871); Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14 (total CVAP: 16,197,740).

[25] U.S. Census Bureau, Table 4b: Reported Voting and Registration by Sex, Race and Hispanic Origin, for States: November 2014 (2014), http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2014/tables.html.

Latino citizens include younger average age and lower educational attainment than Anglos.[26]

4. Registered Voters Who Do Not Vote

In 2014, over 9 million registered voters in Texas did not vote.[27] In 2012, a presidential election year, over 5 million registered voters did not go to the polls.[28]

Low voter turnout is a problem throughout Texas. In Ms. Evenwel's Senate District 1, voter turnout in the 2014 General Election was only 37% of the district's registered voters and only 31% of the district's citizen-voting-age population.[29] Similarly, in Mr. Pfenninger's Senate District 4, voter turnout in the 2014 General Election was only 37% of the

---

[26] U.S. Census Bureau, Table 5: Reported Voting and Registration, by Age, Sex, and Educational Attainment: November 2014 (2014), http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2012/tables.html.

[27] Tex. Legislative Council, Plan S172: 2014 General Election Analysis (2015), ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED206_2014G_Statewides.pdf.

[28] Tex. Legislative Council, Plan S172: 2012 General Election Analysis (2013), ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED206_2012G_Statewides.pdf.

[29] Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 (total voter registration); *see id.*; Tex. Legislative Council, Plan S172: Hispanic Population Profile, App. 14.

district's registered voters and only 34% of the district's citizen-voting-age population.[30]

B. The Metrics Advanced by Plaintiffs Shift Districts Across the State and Create Grossly Overpopulated Districts

As explained in Section II below, apportionment based on either CVAP or registered-voter population does not equalize the weight of votes. However, apportionment on those metrics does result in excessive total population deviations and fewer seats in Houston, Dallas and South and West Texas.

1. The Texas Senate Map and Plaintiffs' Metrics

The Texas Senate contains 31 single-member districts. *See* Tex. Const. art. III, §§ 2, 25. In the current Senate redistricting plan, the ideal total population used for apportioning districts is 811,147.[31] The overall plan deviation from the total population ideal is 8.04%.[32]

---

[30] Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 (total voter registration); *see id.*; Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

[31] Tex. Legislative Council, Plan S172: District Population Analysis (2015), App. 13.

[32] *Id.*

In a Senate redistricting plan apportioned on the basis of CVAP, districts in Houston, Dallas and South and West Texas would have to take on substantial new territory and population in order to reach the ideal.[33]

South and West Texas would lose a Senate district, reducing the number of seats in that region from five to four.[34] The remaining districts would be forced to increase their total populations by an average of over 100,000.[35]

In Houston, Senate District 6, currently represented by Senator Sylvia Garcia, would swell to over one million constituents in order to reach the CVAP ideal.[36] Senate District 6 would also no longer be a Latino opportunity district. The Latino CVAP would drop below 50% and the Latino registered voters

---

[33] *See* Tex. Legislative Council, Proposed Plan S173: Map of Texas Senate Districts Equalized by CVAP (2015), App. 6 (plan proposed for reference by amici curiae); Tex. Legislative Council, Proposed Plan S173: Population and Voter Data with Voter Registration Comparison (2015), App. 19.

[34] *See* Tex. Legislative Council, Proposed Plan S173: Map of Texas Senate Districts Equalized by CVAP (2015), App. 6.

[35] *See* Tex. Legislative Council, Proposed Plan S173: Population and Voter Data with Voter Registration Comparison (2015), App. 19.

[36] *Id.*

would drop from 55% to 45% as the district expanded to take in new areas that are not majority Latino.[37]

Also in Houston, Senate District 13, currently represented by Senator Rodney Ellis, would have to grow to over 900,000 in total population in order to meet the CVAP ideal.[38] As a result, the district's African American voting-age population would drop to 39%.[39]

In Dallas, Senate District 23, represented by Senator Royce West, would have to grow to over 900,000 in total population.[40]

By contrast, Senate District 24 in Central Texas drops more than 100,000 below the ideal total population to 707,313.[41] Senate District 25, also in Central Texas, and Senate District 3, in East Texas, contract to less than 730,000.[42]

---

[37] *Compare* Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14 *with* Tex. Legislative Council, Proposed Plan S173: Hispanic Population Profile (2015), App. 18.

[38] *See* Tex. Legislative Council, Proposed Plan S173: Population and Voter Data with Voter Registration Comparison (2015), App. 19.

[39] *See id.*

[40] *See id.*

[41] *See id.*

[42] *See id.*

Overall, the total population deviation of the plan would be 36.36%.[43] The number of Latino majority districts in the Senate plan would drop from seven to five.[44] Most of the remaining Latino and African American districts would dramatically increase in total population.[45]

Similar to the CVAP apportionment map, a map apportioned based on registered voters would reduce the number of Latino majority districts in the Senate plan from seven to five[46] and most of the remaining Latino and African American districts would dramatically increase in total population.[47] Overall, the total population deviation of the plan would be 58.04%.[48]

---

[43] *See* Tex. Legislative Council, Proposed Plan S173: District Population Analysis (2015), App. 17.

[44] *See* Tex. Legislative Council, Proposed Plan S173: Hispanic Population Profile (2015), App. 18.

[45] *See* Tex. Legislative Council, Proposed Plan S173: Population and Voter Data with Voter Registration Comparison (2015), App. 19.

[46] Tex. Legislative Council, Proposed Plan S174: Hispanic Population Profile (2015), App. 22.

[47] Tex. Legislative Council, Proposed Plan S174: Population and Voter Data with Voter Registration Comparison (2015), App. 23.

[48] Tex. Legislative Council, Proposed Plan S174: District Population Analysis (2015), App. 21.

2. The Texas House Map And Plaintiffs' Metrics

The Texas Constitution's "County Line Rule" requires the Legislature to apportion state House districts to whole counties "according to the number of population in each, as nearly as may be." Tex. Const. art. III, § 26. The County Line Rule "generally limits the redistricting body to the creation of districts that consist of whole counties or groups of whole counties."[49] Following this Court's decision in *White v. Regester*, 412 U.S. 755 (1973), Texas adopted the single member district system of electing state representatives.

In the current Texas House of Representatives districting plan, the district ideal total population is 167,637.[50] This ideal is used by the Legislature to apportion districts to counties and to draw districts.

In a House plan apportioned on the basis of CVAP or registered voters, Cameron and Hidalgo Counties in the Lower Rio Grande Valley would lose a combined two seats because of their low CVAPs and registered-voter populations.[51] El Paso County would

---

[49] Tex. Legislative Council, State and Federal Law Governing Redistricting in Texas at 141 (2011), http://www.tlc.state.tx.us/redist/pdf/2011_0819_State&Federal_Law_TxRedist.pdf.

[50] Tex. Legislative Council, Plan H358: District Population Analysis (2015), App. 25.

[51] *See* Tex. Legislative Council, Plan H358: Hispanic Population Profile (2015), App. 25; Tex. Legislative Council, Plan H358: Population and Voter Data with Voter Registration

(Continued on following page)

lose one seat.[52] This loss of seats reduces those counties to the political representation held in 1980.[53]

Harris County (Houston) would lose two state representative seats and Dallas County would lose one state representative seat.[54]

The negative effects of changing apportionment in the Texas House are not limited to apportionment of seats to counties. Within counties, a House plan apportioned on the basis of CVAP or registered voters would force some districts to expand, and others to contract, in order to meet the new apportionment metric. For example, in Harris County, the House district with the lowest CVAP (HD 137-Gene Wu) is 40% below the CVAP ideal.[55] The House District with

---

Comparison (2015), App. 31; U.S. Census Bureau, Voting Age Population by Citizenship and Race (CVAP), 2009-2013 American Community Survey (2013), https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html; Tex. Sec'y of State, Voter Registration and Unofficial Early Voting Figures (2014), http://www.sos.state.tx.us/elections/historical/counties.shtml.

[52] *See supra* note 51.

[53] *See* Tex. Legislative Council, State House Districts 1982-1984 Elections (2010), http://www.tlc.state.tx.us/redist/pdf/historical_house/h_1982_1984.pdf.

[54] *See supra* note 51; Mex. Am. Legal Def. and Educ. Fund, Map of County Apportionment of House Seats by CVAP – Dallas Region (2015), App. 9; Mex. Am. Legal Def. and Educ. Fund, Map of County Apportionment of House Seats by CVAP – Houston Region (2015), App. 10.

[55] *See* Tex. Legislative Council, Plan H358: Hispanic Population Profile (2015), App. 26.

the highest CVAP (HD 134-Sarah Davis) is 20% above the CVAP ideal.[56] House District 137 would be forced to take on thousands of new residents, while House District 134 would shed residents to meet a CVAP ideal.

Similarly, in Dallas County, the district with the lowest CVAP (HD 103-Rafael Anchia) is 33% below the ideal and the district with the highest CVAP (HD 108-Morgan Meyer) is 13% above the ideal.[57] As in Houston, districts below the CVAP ideal in Dallas would become grossly malapportioned as thousands of individuals are packed into their boundaries, while other districts contract and become much smaller in total population.

C. The Loss of Legislative Seats, and the Creation of Super-sized Districts, will Injure Constituents and Elected Representatives

The apportionment metrics advanced by Plaintiffs reduce the number of representatives from Houston, Dallas and South and West Texas and make it harder for the remaining representatives in those delegations to pass legislation serving regional interests. In addition, the accompanying growth of "underpopulated" districts to take in dramatically higher total population puts impossible burdens on the

---

[56] *See id.*

[57] *See id.*

legislators representing these districts and forces constituents to compete with each other for scarce legislator time and resources.

In super-sized districts, Senators and Representatives will be hard-pressed to represent all of their voters as well as disproportionately high numbers of non-voters. For example, in order to meet a CVAP ideal, Senate District 29 (El Paso) would have to expand to take in Del Rio, a city of over 35,000 residents, located 423 miles from El Paso.[58] The Senator who represents SD 29, Jose Rodriguez, would have to reallocate his already small office budget to cover the new geography and would face having to close an existing district office to open a new office in or near Del Rio. Senator Rodriguez would have to stretch his small staff to respond to requests for assistance from over 90,000 new constituents.

In addition to the drain on member and staff resources, legislative districts that grow to take in disproportionately high populations also take in more geographic areas with competing interests. Although all legislative districts contain a variety of interests, adding more people and more geography to some

---

[58] *Compare* Tex. Legislative Council, Plan S172: Map of Current Texas Senate Districts (2014), App. 5 *with* Tex. Legislative Council, Proposed Plan S173: Map of Texas Senate Districts Equalized by CVAP (2015), App. 6; *see also* U.S. Census Bureau, American FactFinder, 2014 Population Estimate (2014), http://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml (search "Del Rio City, Texas").

districts will overburden them compared to other districts that will stay the same size or even become smaller. The competing needs for economic development, improvements in roads and highways, public safety, healthcare, and education will become even greater in districts that take in new counties and cities in order to meet a CVAP or registered-voter population ideal.

II. Plaintiffs' Claim to an "Equally Weighted Vote" Is Illusory and Cannot Form the Basis of an Equal Protection Claim

The practical goal of Plaintiffs' standard is to shift legislative seats, and public policy, from one part of the state to another based on votes cast in elections.[59]

Plaintiffs claim that their equally-populated districts are unconstitutional because the districts do not guarantee equality in the weight of their votes. Plaintiffs invoke a "right to an equally weighted vote" and "the right of *voters* to an equally weighted *vote*."[60]

As the Court has explained, its requirement of equal population in districts does not and is not intended to equalize the weight of a vote:

---

[59] *See* Mex. Am. Legal Def. and Educ. Fund, Plan S172: Map of District Variation in Voting-Age Population (2015), App. 1.

[60] Pls.' Opp'n to Mot. to Dismiss, ECF. No. 20 at 7, 9 (emphasis original).

> [I]t must be recognized that total population, even if absolutely accurate as to each district when counted, is nevertheless not a talismanic measure of the weight of a person's vote under a later adopted reapportionment plan. . . . [I]f it is the weight of a person's vote that matters, total population – even if stable and accurately taken – may not actually reflect that body of voters whose votes must be counted and weighed for the purposes of reapportionment, because 'census persons' are not voters.

Gaffney v. Cummings, 412 U.S. 735, 746-48 (1973) (internal citations omitted)

That same year, the Court ruled that a 9.90% variation in equal population in Texas legislative redistricting did not give rise to a one-person-one-vote violation:

> For the reasons set out in *Gaffney v. Cummings*, *supra*, we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation. Those reasons are as applicable to Texas as they are to Connecticut.

White, 412 U.S. at 764. Of note, this Court found no malapportionment in the Texas House plan despite the Court's recognition that Mexican Americans lived in heavily concentrated communities in some areas of the state and that "Mexican-American voting

registration remain[s] very poor in the county." *Id.* at 768. If the Equal Protection Clause required equalization of the weight of a vote, the fact that few Mexican Americans were voting in 1973 would have rendered the state's redistricting plan malapportioned. This Court made no such finding.

A. As a Practical Matter, the "Weight" of Votes Cannot Be Equalized

Even if a state tried to equalize the weight of votes by apportioning population based on votes cast, the endeavor would be fruitless. Voter turnout is a moving target; it varies with every election.[61] As voter turnout rises and falls, a state would have to redraw its political boundaries after every election – creating confusion for voters and elected officials. Also, because past elections cannot predict turnout in future elections, the goal of an equally-weighted vote would remain forever out of reach as the state looked backward to past elections to draw its political lines.[62]

---

[61] For example, in the 2012 November General Election, 8,049,220 Texans voted. *See* Tex. Legislative Council, Plan S172: 2012 General Election Analysis (2013), ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED206_2012G_Statewides.pdf. Two years later, in the November 2014 General Election, Texas voter turnout dropped 41% to 4,727,805. *See* Tex. Legislative Council, Plan S172: 2014 General Election Analysis (2015), ftp://ftpgis1.tlc.state.tx.us/PlanS172/Reports/PDF/PlanS172_RED206_2014G_Statewides.pdf.

[62] *See Burns v. Richardson*, 384 U.S. 73, 92 (1966) (noting that registered or actual voter numbers vary depending on who

(Continued on following page)

There is even fluctuation in voter turnout for districts in the same redistricting plan, as officials elected in staggered terms (like the Texas Senate) face very different electorates. For example, during the last decade, Ms. Evenwel voted for her Senator in non-presidential years. In 2010, her Senate District 1 elected its Senator with only 140,273 votes.[63] Because so few voters in Ms. Evenwel's Senate district cast a ballot in that race, Ms. Evenwel's vote was weighted among the most powerful across Senate districts in that election.[64] Comparing the vote of Ms. Evenwel to the electorate for Senate seats in the 2008 election demonstrates that, for those elections, any injury flowing from an unequally weighted vote belonged to most 2008 Senate voters, and not Ms. Evenwel.[65]

---

chooses to participate, competitiveness of the campaign, and even the weather).

[63] *See* Tex. Sec'y of State, 2010 General Election Race Summary Report (2010), http://elections.sos.state.tx.us/elchist154_state.htm.

[64] *See id.*

[65] *Compare id. with* Tex. Sec'y of State, 2008 General Election Race Summary Report (2008), http://elections.sos.state.tx.us/elchist141_state.htm.

B. Apportionment Based on Voter Eligibility Metrics Such as CVAP or Registered Voters Creates Bizarre Results and Does Not Equalize the Weight of Votes

Comparing votes cast in an election (i.e., the substance giving "weight" to the vote) to either CVAP or registered voters is an apples-to-oranges comparison. The chasm between the approximations (CVAP and registered voters) and the standard (votes cast) is too wide to bridge. Moreover, apportionment based on CVAP or registered voters creates arbitrary results.

1. The Texas Senate Plan and CVAP

CVAP would not cure Plaintiffs' claimed injury of unequally weighed votes and, in some cases, would exacerbate the injury.

If Senate districts were apportioned based on CVAP, Ms. Evenwel and Mr. Pfenninger would remain disadvantaged based on the weight of their votes cast as compared to voters in other districts with lower voter turnout and higher CVAP. For example, Senate Districts 3, 5, 22, 24, 28, and 30 all contain greater CVAP than Mr. Pfenninger's District 4, but District 4 casts more ballots than Districts 3, 5, 22, 24, 28, and 30.[66] Under the current plan, Mr.

---

[66] *Compare* Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 *with* Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

Pfenninger's vote cast carries less weight in determining Senate elections than votes cast in Districts 3, 5, 22, 24, 28, and 30 because District 4 voters cast more votes than these other districts. However, if Senate districts were reapportioned to equalize CVAP, Districts 3, 5, 22, 24, 28, and 30 would drop more CVAP than would District 4 because each of these districts has a higher CVAP than District 4.[67] Assuming voters are equally distributed across CVAP, following reapportionment, District 4 would cast *even more* votes when compared to Districts 3, 5, 22, 24, 28, and 30 than before reapportionment. Therefore, CVAP-based apportionment would exacerbate Mr. Pfenninger's claimed injury of an unequally-weighted vote with respect to these districts.[68]

Just as problematic, under Plaintiffs' proposed standard, CVAP-equalized apportionment would diminish the weights of votes cast in Dallas and Houston. Voters in current Senate Districts 23 (Dallas) and 15 (Houston) cast more ballots but have lower CVAPs as compared to Districts 19, 20, 21, and 26.[69] Voters in Senate District 7 (Houston) present the

---

[67] All of these districts are above the CVAP ideal of 522,508. *See* Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

[68] Similarly, the weight of Ms. Evenwel's vote would be diminished as compared to votes cast in Districts 3, 5, and 30.

[69] *Compare* Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 *with* Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

most extreme example. Their votes would be diminished as compared to votes cast in Districts 2, 11, 14, 19, 22, 24, 26, 28, 30, and 31.[70]

On the other hand, the highest CVAP Senate district in the state, Senate District 3, is considered "over populated" for CVAP-equalized apportionment, despite casting fewer votes in the 2012 General Elections than Districts 1, 4, 5, 10, 14, 17, 18, and 25.[71]

The metric of voter registration for apportionment also creates winners and losers that do not track the weight of the vote. For example, in the 2014 General Election, Senate District 15 (Houston) cast more votes than Senate Districts 19, 20, 21, 26, and 29 but has fewer registered voters.[72] The unexpected winner in apportionment based on voter registration is Senate District 30 (Wichita Falls). Because of its higher voter registration, Senate District 30 is "more populated" when compared to the following Districts, all of which cast more votes than Senate District 30

---

[70] *See* Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15; Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

[71] *Compare* Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 *with* Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

[72] *See* Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15.

in the 2014 General Election: 1, 4, 5, 7, 8, 10, 11, 12, 16, 17, 18, 22, and 24.[73]

The disparity in the weight of votes across districts created by using CVAP or registered voters for apportionment gives rise to the exact type of imbalance that Plaintiffs claim violates the Equal Protection Clause. The arbitrary results that flow from using CVAP or voter registration render these metrics inappropriate for apportionment.

C. Equalization of Both Total Population and Voters Cannot Be Achieved

Plaintiffs' standard requires the impossible – districts that simultaneously equalize total population and voters. Such a redistricting plan is a chimera; it cannot be formed.

1. Plaintiffs' Complaint Asserts Dual Constitutional Mandates

According to Plaintiffs' complaint, "[t]he one-person, one-vote principle requires Texas to safeguard the right of electors like [Plaintiffs] to an equally weighted vote *in addition to* equal representation based on total population."[74] Under the asserted dual mandates, "Texas should not be permitted to base

---

[73] *See id.*

[74] Compl., J.S. App. 31a (emphasis added).

apportionment on voter population alone."[75] Plaintiffs distinguished their dual-mandate standard from the single-mandate standard asserted in *Chen v. City of Houston*, 206 F.3d 502, 522 (5th Cir. 2002), that CVAP alone must be equalized.[76] The district court accordingly, considered and rejected only Plaintiffs' asserted dual-mandate standard.[77]

2. Plaintiffs Tiptoe Away from Dual Mandates But Continue to Assert that Both Total Population and Voters Can Be Equalized

Plaintiffs now subtly shift from a dual-mandate standard toward a single-mandate standard in this Court. They assert: "[T]he 'population' States must equalize for one-person, one-vote purposes is the population of eligible voters."[78] Plaintiffs now deem

---

[75] Pls.' Mot. for Sum. J., ECF No. 12, at 9.

[76] *See id.* ("*Chen* decided a legal issue different from the one presented here. In *Chen* . . . the Fifth Circuit was confronted with an argument that the Fourteenth Amendment required Houston 'to use CVAP rather than total population' in designing city council districts.") (quoting *Chen*, 206 F.3d at 523); *see also* Compl., J.S. App. 32a ("*Chen* did not consider whether electoral power could be ignored when it is possible to safeguard both interests.").

[77] *See* Mem. Op., J.S. 5a ("[Plaintiffs] conclude that PLANS 172 [*sic*] violates the one-person, one-vote principle of the Equal Protection Clause by not apportioning districts to equalize *both* total population and voter population.") (emphasis original).

[78] Pls.' Br. 15.

districts of equalized total population to be merely a state "interest," not a mandate.[79]

This Court should consider only Plaintiffs' dual-mandate standard because Plaintiffs did not assert a single-mandate standard in their complaint, and the district court did not consider a single-mandate standard. *See Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) ("Ordinarily, we do not decide in the first instance issues not decided below.") (internal quotations omitted).

Plaintiffs, nevertheless, continue to assert that both total population and voters can be equalized in a Texas Senate districting plan.[80] Plaintiffs have never supported their assertion with anything other than implausible, conclusory statements.[81]

---

[79] *See id.* at 48.

[80] *See id.* at 46 ("[H]ad the Texas Legislature used the population of eligible voters as its starting point . . . , it still could have largely reconciled total and voter population.").

[81] *See, e.g.*, Pls.' Mot. for Summ. J., ECF No. 12-1 (Declaration of Peter A. Morrison, Ph.D.: "I was not asked to, and did not attempt to, devise a plan that would optimally balance [CVAP and total population] deviations. . . . I was able to create a 31-district plan . . . that eliminated the gross deviations in CVAP without significantly exceeding the 8.04% total population deviation from ideal in Plan S172.").

3. Both Total Population and Voters Cannot Be Equalized Across Texas Senate Districts

Texas's concentrations of children, non-citizens, non-registered voters, and non-voting-but-registered voters prevent the drawing of Texas Senate districts equalizing both total population and voters within overall plan deviations of 10%.[82]

The current Texas Senate plan has a deviation of 8.04% based on total population. Therefore, the plan is balanced for total population within an acceptable range. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983).[83] To achieve Plaintiffs' dual-mandate standard, current Senate districts would have to gain or lose significant numbers of children, citizens, registered voters, and actual voters, without significantly

---

[82] If the standard of "equalized" total population and voters is not equalization within 10% deviations, but is rather a "best-fit" or "lowest-possible-combined deviation," then the standard is not a dual-mandate standard, as asserted. The Court has never required a State to minimize the combined deviations of two population measures; instead, it has allowed deviations greater than 10% for "nonpopulation criteria." *See Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); *see also Karcher v. Daggett*, 462 U.S. 725, 740 (1983) ("Any number of consistently applied legislative policies might justify some variance [in population equality], including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.").

[83] *See* Tex. Legislative Council, Plan S172: District Population Analysis (2015), App. 13.

altering total population numbers. Regional variations in the populations of children, citizens, registered voters, and actual voters make this task impossible.[84]

Current Districts 27 (Brownsville) and 29 (El Paso) illustrate why a dual-mandate plan cannot be devised. Each district is underpopulated by voting-age population,[85] CVAP,[86] registered voters,[87] and actual voters.[88] Districts 27 and 29, however, cannot add significant numbers of voting-age residents, citizen-voting-age residents, registered voters or actual voters

---

[84] The task is impossible to the extent that districts must be contiguous. *Cf.* Compl., J.S. App. 24a ("It would have been possible for the Texas Legislature to adjust district boundaries so as to create 31 contiguous districts containing both relatively equal numbers of electors and relatively equal total population.").

[85] The voting-age population of District 27 is 524,120, a deviation of -11.12% from ideal; the voting-age population of District 29 is 571,426, a deviation of -3.09% from ideal. *See* Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15.

[86] The CVAP of District 27 is 399,530, a deviation of -23.54% from ideal; the CVAP of District 29 is 469,130, a deviation of -10.26% from ideal. *See* Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14.

[87] The registered-voter population of District 27 is 354,303, a deviation of -21.81% from ideal; the registered-voter population of District 29 is 415,152, a deviation of -8.39% from ideal. *See id.*

[88] The actual-voter population of District 27 is 84,566, a deviation of -44.55% from ideal; the actual-voter population of District 29 is 83,529, a deviation of -45.23% from ideal. *See* Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15.

because (1) they are at or near ideal total population,[89] and (2) they are surrounded by other districts lacking the same population groups.[90] Thus, if Districts 27 and 29 added significant numbers of voting-age residents, citizen-voting-age residents, registered voters, or actual voters by taking those individuals from surrounding districts, Districts 27 and 29 would greatly exceed acceptable total population deviations,[91] and the new Districts 27 and 29 would drain surrounding districts of population, which would further exacerbate those districts' negative deviations from ideal voting-age population, citizen-voting-age population, registered-voter population, and actual-voter population.

To achieve the dual mandates, Districts 27 and 29 would have to swap populations with districts on the opposite end of the deviation spectrum. Those districts, however, are not contiguous to Districts 27 and 29.[92]

---

[89] The total population of District 27 is 786,946, a deviation of -2.98% from ideal; the total population of District 29 is 816,681, a deviation of 0.68% from ideal. *See id.*

[90] *See* Mex. Am. Legal Def. and Educ. Fund, Plan S172: Maps of District Variation in Voting-Age Population, CVAP, Voter Registration, and Votes Cast (2015), Apps. 1-4.

[91] Districts 27 and 29 would add geography that included not just the desired populations, but also all other population groups, including children, non-citizens, non-registered voters, and non-voters.

[92] *See* Mex. Am. Legal Def. and Educ. Fund, Plan S172: Maps of District Variation in Voting-Age Population, CVAP, Voter Registration, and Votes Cast (2015), Apps. 1-4.

Amici curiae have drafted alternative maps equalizing CVAP population and registered voters across Texas Senate districts, within 4% total deviation.[93] In each alternative map, South Texas loses a seat (District 19) because all current South Texas districts (Districts 19, 20, 21, 27, and 29) must add populations of citizen-voting-age residents and registered voters to bring those deviations within acceptable limits. Achieving equalization under these measures, however, massively increases the plans' total population deviations from ideal. Total population deviation goes from a baseline of 8.04% in the current Texas Senate plan, to 36.36% in the CVAP-equalized plan and to 58.04% in the registered-voter-equalized plan.[94] Under the CVAP-equalized plan, Districts 27 and 29 jump in population and acquire total population deviations of 18.80% and 12.04%, respectively.[95] Likewise, District 6 in Houston and

---

[93] *See* Tex. Legislative Council, Proposed Plan S173: Map of Texas Senate Districts Equalized by CVAP (2015), App. 6; Tex. Legislative Council, Proposed Plan S174: Map of Texas Senate Districts Equalized by Voter Registration (2015); App. 7.

[94] *Compare* Tex. Legislative Council, Plan S172: District Population Analysis (2015), App. 13 *with* Tex. Legislative Council, Proposed Plan S173: District Population Analysis (2015), App. 17 *and* Tex. Legislative Council, Proposed Plan S174: District Population Analysis (2015), App. 21.

[95] *See* Tex. Legislative Council, Proposed Plan S173: Population and Voter Data with Voter Registration Comparison (2015), App. 19. Under the registered-voter-equalized plan, Districts 27 and 29 realize total population deviations of 18.80% and 9.83% respectively. *See* Tex. Legislative Council, Proposed Plan S174: Population and Voter Data with Voter Registration Comparison (2015), App. 23.

District 23 in Dallas add CVAP and registered voters to correct large negative deviations in these measures under the current plan.[96] Consequently, the total population deviations for District 6 and District 23 jump to 23.56% and 12.29%, respectively, under the CVAP-equalized plan.[97]

4. Both Total Population and Voters Cannot Be Equalized Across Texas House Districts

Plaintiffs do not assert that the Texas House can be districted to achieve their asserted dual-mandate standard. However, the principle of equal protection does not stop with one legislative chamber. *See Md. Comm. for Fair Representation v. Tawes*, 377 U.S. 656, 673 (1964) ("It is simply impossible to decide upon the validity of the apportionment of one house of a bicameral legislature in the abstract, without also

---

[96] *See* Tex. Legislative Council, Plan S172: Hispanic Population Profile (2015), App. 14 (District 6 CVAP deviation: -26.51%; District 23 CVAP deviation: -10.69%); Tex. Legislative Council, Plan S172: Population and Voter Data with Voter Registration Comparison (2015), App. 15 (District 6 registered-voter deviation: -34.76%; District 23 registered-voter deviation: -8.29%).

[97] *See* Tex. Legislative Council, Proposed Plan S173: Population and Voter Data with Voter Registration Comparison (2015), App. 19. District 6's total population deviation increases to 35.49% under the registered-voter-equalized plan, and District 23's total population deviation increases to 12.29% under this plan. *See* Tex. Legislative Council, Proposed Plans 174: Population and Voter Data with Voter Registration Comparison (2015), App. 23.

evaluating the actual scheme of representation employed with respect to the other house."); *see also Lucas v. Colo. Gen. Assembly*, 377 U.S. 713, 735 n.27 (1964) ("[In *Tawes*] we discussed the need for considering the apportionment of seats in both houses of a bicameral state legislature in evaluating the constitutionality of a state legislative apportionment scheme, regardless of what matters were raised by the parties and decided by the court below."). Accordingly, the Court must consider Plaintiffs' dual-mandate standard as applied to the Texas House.

The Texas House cannot be districted in a plan that equalizes both total population and voters for the same reasons that prevent the drawing of an equalized-total-population-and-voter-eligible plan in the Texas Senate. In fact, the reasons are more pronounced with the Texas House.

The Texas House is comprised of 150 districts, each wholly contained within a single county where possible. This County Line Rule prevents statewide equalization of both total population and voters because it limits how districts may be altered. For example, El Paso County contains districts 75, 76, 77, 78, and 79.[98] Each of these five districts is equalized for total population, but all have negative CVAP

---

[98] *See* Tex. Legislative Council, Plans S172: Map of Current Texas Senate Districts (2014), App. 5.

deviations under the current plan.[99] If the County Line Rule is followed, in El Paso County there is no way to reallocate the population to equalize CVAP across all districts because the county's population contains too few citizen-voting-age residents to bring all five districts near the statewide ideal.[100]

If the County Line Rule is abandoned, regional differences in populations of children, citizens, registered voters, and actual voters would prevent the drawing of districts equalizing total population and eligible voters for the same reasons that apply to the Texas Senate. Current House districts in South Texas, Dallas, and Houston, which are equalized for total population, are completely, or nearly completely, surrounded by districts similarly lacking in CVAP.[101] One or more of these South Texas, Dallas, and Houston districts could achieve ideal CVAP, but, consequently, swell in total population and further deprive neighboring districts of CVAP.

---

[99] *See* Mex. Am. Legal Def. and Educ. Fund, Plan H358: Map of District Variation in CVAP (2015), App. 11. The CVAP deviations are: District 75, -28.27%; District 76, -12.30%; District 77, -15.88%; District 78, -8.39%; and District 79, -8.84%. *See* Tex. Legislative Council, Plan H358, Hispanic Population Profile (2015), App. 26.

[100] It may be possible to equalize CVAP if El Paso County loses a seat; however the remaining four districts would greatly exceed the ideal total population.

[101] *See* Tex. Legislative Council, Plan H358: Map of Current Texas House Districts (2014), App. 8.

5. Plaintiffs' Dual-Mandate Standard Should Be Rejected Because the Court Does Not Impose Impossible Standards

The law does not create traps. *See Ala. Leg. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015) ("The law cannot lay a trap for an unwary legislature, condemning its redistricting plan as either (1) unconstitutional racial gerrymandering should the legislature place a few too many minority voters in a district or (2) retrogressive under [Voting Rights Act] § 5 should the legislature place a few too few."). Plaintiffs' dual-mandate standard creates an impossible goal in Texas by establishing competing constitutional limits.[102] The Court should reject Plaintiffs' standard because, as implemented in Texas, the standard is impossible to satisfy.

III. The Current Effort to Reduce Latino Representation Through Apportionment Follows a Long History of Voting Discrimination in Texas

The radical changes in apportionment sought by Plaintiffs, if adopted by Texas, would raise an inference of unconstitutional racial discrimination against Latino voters.

---

[102] *Cf.* Pls.' Mot. for Summ. J., ECF No. 12 at 9-10 ("Texas should not be permitted to base apportionment on voter population alone; it must fairly balance all relevant factors within constitutional limits.").

In *LULAC v. Perry*, 548 U.S. 399, 439 (2006), this Court noted "the long history of discrimination against Latinos and Blacks in Texas" (internal quotations omitted). The Court explained:

> 'Texas has a long, well-documented history of discrimination that has touched upon the rights of African-Americans and Hispanics to register, to vote, or to participate otherwise in the electoral process. Devices such as the poll tax, an all-white primary system, and the restrictive voter registration time periods are an unfortunate part of this State's minority voting rights history. The history of official discrimination in the Texas election process – stretching back to Reconstruction – led to the inclusion of the state as a covered jurisdiction under Section 5 in the 1975 amendments to the Voting Rights Act. Since Texas became a covered jurisdiction, the Department of Justice has frequently interposed objections against the State and its subdivisions.'

Id. at 439-40 (quoting *Vera v. Richards*, 861 F. Supp. 1304, 1317 (S.D. Tex. 1994)).

Two years before the Court struck down state poll taxes in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), Texans voted to retain the poll tax despite public recognition that it operated to

exclude Latinos and African Americans from voting.[103] The same year as *Harper*, the Texas Legislature met in a special session and enacted Senate Bill 1, which required voters to re-register annually.[104] The annual re-registration requirement was not rescinded by the Texas Legislature until 1971.[105]

In 1973, this Court declared that Texas's use of multi-member election districts in San Antonio and Dallas diluted minority voting strength in violation of the Fourteenth Amendment. *White*, 412 U.S. 755. The Court took particular note of the historical factors leading to very low political participation rates by Mexican Americans in Bexar County in South Texas:

> The Barrio is an area of poor housing; its residents have low income and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult, particularly, the [district] court thought, with respect to the political life of Bexar County. '(A) cultural incompatibility . . . conjoined with the poll tax and the most restrictive

---

[103] Dallas Public Library, Voting Rights: The Poll Tax, Marion Butts Collection, http://dallaslibrary2.org/mbutts/assets/lessons/L9-voting+rights/Marion%20Butts%20-%20Voting%20Rights%28PPT%29.pdf.

[104] O. Douglas Weeks, Tex. State Historical Ass'n, Election Laws, Handbook of Texas Online (2010), https://tshaonline.org/handbook/online/articles/wde01.

[105] *Id.*

> voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.' [*Graves v. Barnes*, 343 F. Supp. 704, 731 (W.D. Tex. 1972).] The residual impact of this history reflected itself in the fact that Mexican-American voting registration remained very poor in the county.

White, 412 U.S. at 768-69.

Texas legislators continued to draw district boundaries that diluted the Latino vote after *White*. In every decade since the 1970's, one or more Texas statewide redistricting plans was blocked by the U.S. Department of Justice or the federal courts for illegally diluting Latino votes.[106]

---

[106] *See* Letter from U.S. Dep't of Justice to Tex. Sec'y of State (Jan. 1976), http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-1020.pdf (Texas House); Letter from U.S. Dep't of Justice to Tex. Sec'y of State (Jan. 25, 1982), http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-1900.pdf (Texas Senate); Letter U.S. Dep't of Justice to Tex. Sec'y of State (Jan. 25, 1982), http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-1910.pdf (Texas House); Letter from U.S. Dep't of Justice to Tex. Sec'y of State (Nov. 12, 1991), http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2380.pdf (Texas House); Letter from U.S. Dep't of Justice to Tex. Sec'y of State (Nov. 16, 2001), http://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2930.pdf (Texas House); *Perez v. Texas*, No. 11-CA-360-OLG-JES-XR, slip op. (W.D. Tex. Mar. 19, 2012) (Texas House).

Most recently, in 2006, the Court struck down the Texas congressional redistricting plan because it diluted Latino voting strength in violation of section 2 of the Voting Rights Act. *See LULAC*, 548 U.S. at 440.

The battles for political opportunity fought by Latinos in Texas have resulted in seven Senate districts in which Latinos have the opportunity to elect their candidate of choice. Changing the apportionment metric for the Texas Senate would reduce the number of opportunity districts by at least two, sending the map back to the 1980's.[107] The Texas House map would suffer a similar fate. Worse, many Latino voters would find themselves not only with fewer opportunity districts overall, but also living in districts that contain far more constituents than districts that elect Anglo representatives.

Because the apportionment metrics advanced by Plaintiffs are tailored to characteristics of the Latino community (such as youth and low voter-registration rates), and the metrics themselves do not equalize the weight of votes, their use gives rise to an inference of intentional vote dilution in violation of the Fourteenth Amendment.

---

[107] *See* Tex. Legislative Council, State Senate Districts 1982 Election (2010), http://www.tlc.state.tx.us/redist/pdf/historical_senate/s_1982.pdf.

IV. The Effect of Shifting Political Representation to More Homogenous Communities Will Be Fewer Policy Proposals and Less Enacted Legislation Addressing the Needs of Diverse Communities in Urban Areas and in South and West Texas

Plaintiffs' proposed apportionment standard would shift representation from urban areas to rural areas and from South and West Texas to Central and East Texas.

A. Past Legislative Accomplishments May Never Have Been Achieved

Against these headwinds, communities in urban areas and in South and West Texas may never have achieved the legislative accomplishments of recent sessions.

Before 2013, the Lower Rio Grande Valley did not have a medical school to serve the region's 1.2 million inhabitants.[108] The region suffers from the highest incidence of diabetes in the state, and a third of its residents live below the poverty line.[109] In the 2013

---

[108] *See* U.S. Census Bureau, Metropolitan Statistical Areas; and for Puerto Rico, 2014 Population Estimates (2014), https://www.census.gov/popest/data/metro/totals/2014/ (adding McAllen-Edinburg-Mission, TX Metro Area and Brownsville-Harlingen, TX Metro Area).

[109] *See* Tex. Dep't of State Health Serv., The Health Status of Texas at 39, Map 20 (2014), https://www.dshs.state.tx.us/chs/HealthStatusTexas2014.pdf; U.S. Census Bureau, 2013 Small Area Income

(Continued on following page)

Texas Legislative Session, Senators from South and West Texas worked together to co-author and pass a bill establishing a medical school in the Rio Grande Valley.[110] They lobbied their colleagues in the Senate, secured funding and gathered the necessary votes to win passage of the bill. If representation had been stripped from South and West Texas, the delegation would have been smaller and less influential, and this generational accomplishment might never have been achieved.

B. Harmful Legislation May Be Imposed if Large, Diverse Communities are Underrepresented

Diverse communities strengthen a representative democracy by providing balance to majority factions. *See* The Federalist No. 10 (James Madison) ("Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens."). Plaintiffs' proposed standard would shift political power away from growing and diverse communities in urban areas and South and West Texas towards more established and more homogenous communities in Central and East

---

and Poverty Estimates (2013), http://www.census.gov/did/www/saipe/data/statecounty/data/2013.html (data for Cameron and Hidalgo Counties).

[110] *See* Act of May 22, 2013, 83d Leg., R.S., ch. 726, 2013 Tex. Gen. Laws 1846.

Texas. Weakening the presence of large, diverse communities at the state Capitol can lead to passage of laws detrimental to those communities.

Of immediate concern, legislation narrowly defeated by coalitions of Senators representing districts in urban areas and West and South Texas may pass in future sessions if Senate seats shift to Central and East Texas. Among such narrowly defeated measures in 2015 was Senate Bill 185, which would have banned cities from taking local needs into account when designing policies on police questioning of immigrants.[111] Passage of the measure would have severely constrained local control and chilled police-community relations – particularly in high-minority-population communities. Senators from Dallas, Houston and South and West Texas joined with a small number of additional colleagues in a bipartisan effort to defeat the bill.[112] The group of 13 Senators denied the bill's supporters a three-fifths majority needed to bring the bill for debate on the Senate floor, a necessary precursor to passage.[113] A switch of just

---

[111] *See* Tex. S.B. 185, 84th Leg., R.S. (2015).

[112] *See* Julian Aguilar, *With Clock Running, Immigration Bills Cling to Senate Calendar*, Tex. Tribune, May 19, 2015, *available at* http://www.texastribune.org/2015/05/19/-state-repeal-sanctuary-cities-back-calendar-there/.

[113] *See id.*; *see also* Tex. S. Rules 5.13, 16.07, S. Res. 39, 84th Leg., R.S, 2015 S.J. of Tex. 50, 50-53.

one Senator from opposition to support would have enabled the bill to move forward.

CONCLUSION

For the foregoing reasons and those stated in the brief by Texas, the judgment below should be affirmed.

Respectfully submitted,

NINA PERALES
Counsel of Record
THOMAS A. SAENZ
JOHN PAUL SALMON
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATIONAL FUND, INC.
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
nperales@maldef.org

Counsel for Amici Curiae

September 25, 2015

No. 14-940

In The

Supreme Court of the United States

SUE EVENWEL, ET AL.,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, ET AL.,

Appellees.

On Appeal From The United States District Court For The Western District Of Texas

APPENDIX TO BRIEF OF THE TEXAS SENATE HISPANIC CAUCUS AND THE TEXAS HOUSE OF REPRESENTATIVES MEXICAN AMERICAN LEGISLATIVE CAUCUS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

NINA PERALES
Counsel of Record
THOMAS A. SAENZ
JOHN PAUL SALMON
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.
110 Broadway, Suite 300
San Antonio, TX 78205
(210) 224-5476
nperales@maldef.org

Counsel for Amici Curiae

September 25, 2015

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF APPENDICES

Page

Plan S172: Map of District Variations in VAP ..... App. 1

Plan S172: Map of District Variations in CVAP ..... App. 2

Plan S172: Map of District Variations in VR ..... App. 3

Plan S172: Map of District Variations in Votes Cast ..... App. 4

Plan S172: Map of Current Texas Senate Districts ..... App. 5 (back of sheet)

Plan S173: Map of Texas Senate Districts Equalized by CVAP ..... App. 6

Plan S174: Map of Texas Senate Districts Equalized by VR ..... App. 7

Plan H358: Map of Current Texas House Districts ..... App. 8

Map of County Apportionment of House Seats by CVAP – Dallas Region ..... App. 9

Map of County Apportionment of House Seats by CVAP – Houston Region ..... App. 10

Plan H358: Map of District Variations in CVAP ..... App. 11

Plan H358: Map of Latino Majority Districts ..... App. 12

Plan S172: District Population Analysis, Page One ..... App. 13

Plan S172: Hispanic Population Profile ..... App. 14

Plan S172: Population and Voter Data and VR Comparison ..... App. 15

Plan S173: District Population Analysis, Page One ..... App. 17

Plan S173: Hispanic Population Profile ..... App. 18

Plan S173: Population and Voter Data with VR Comparison ..... App. 19

Plan S174: District Population Analysis, Page One ..... App. 21

Plan S174: Hispanic Population Profile ..... App. 22

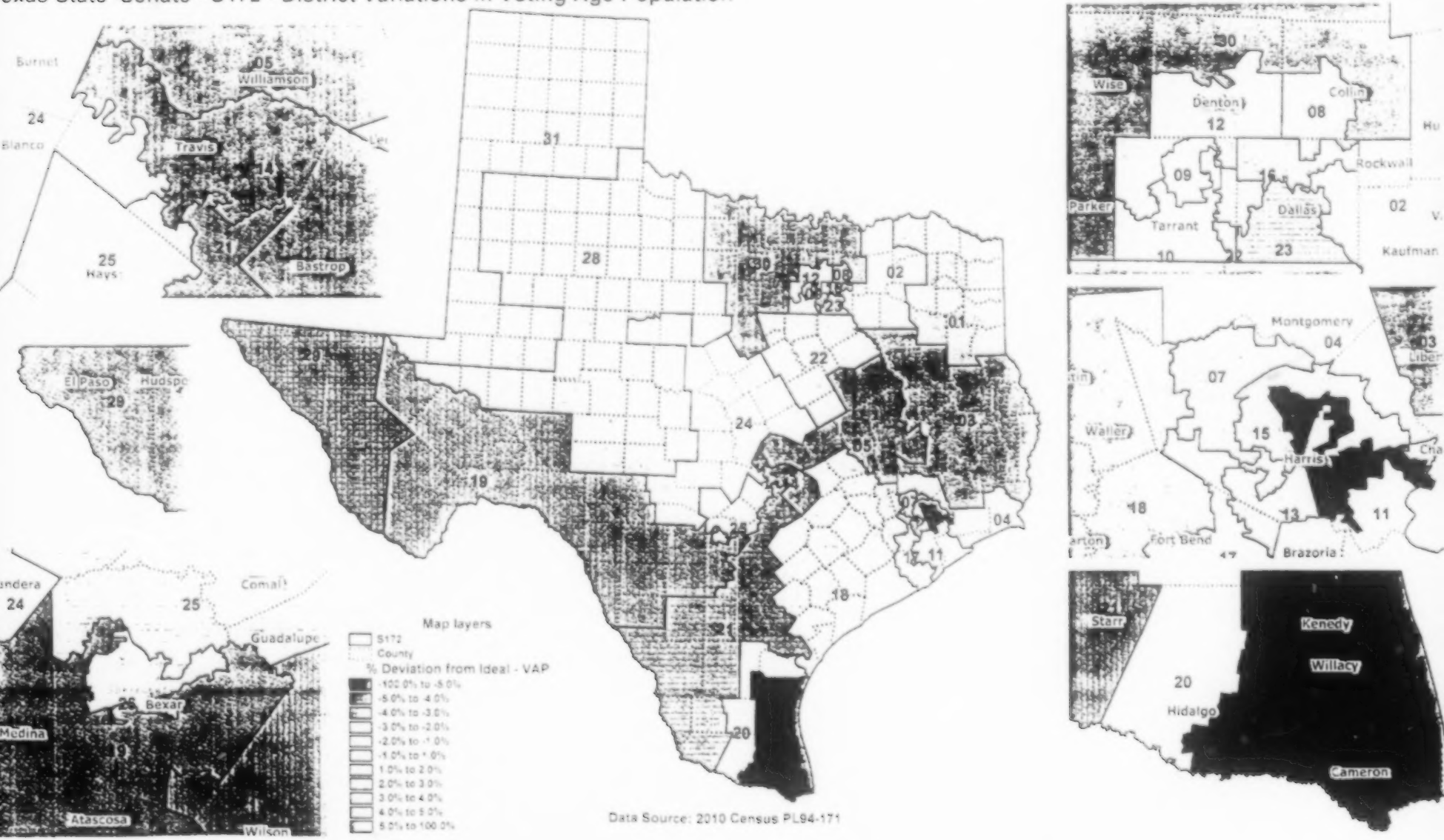
Plan S174: Population and Voter Data with VR Comparison ..... App. 23

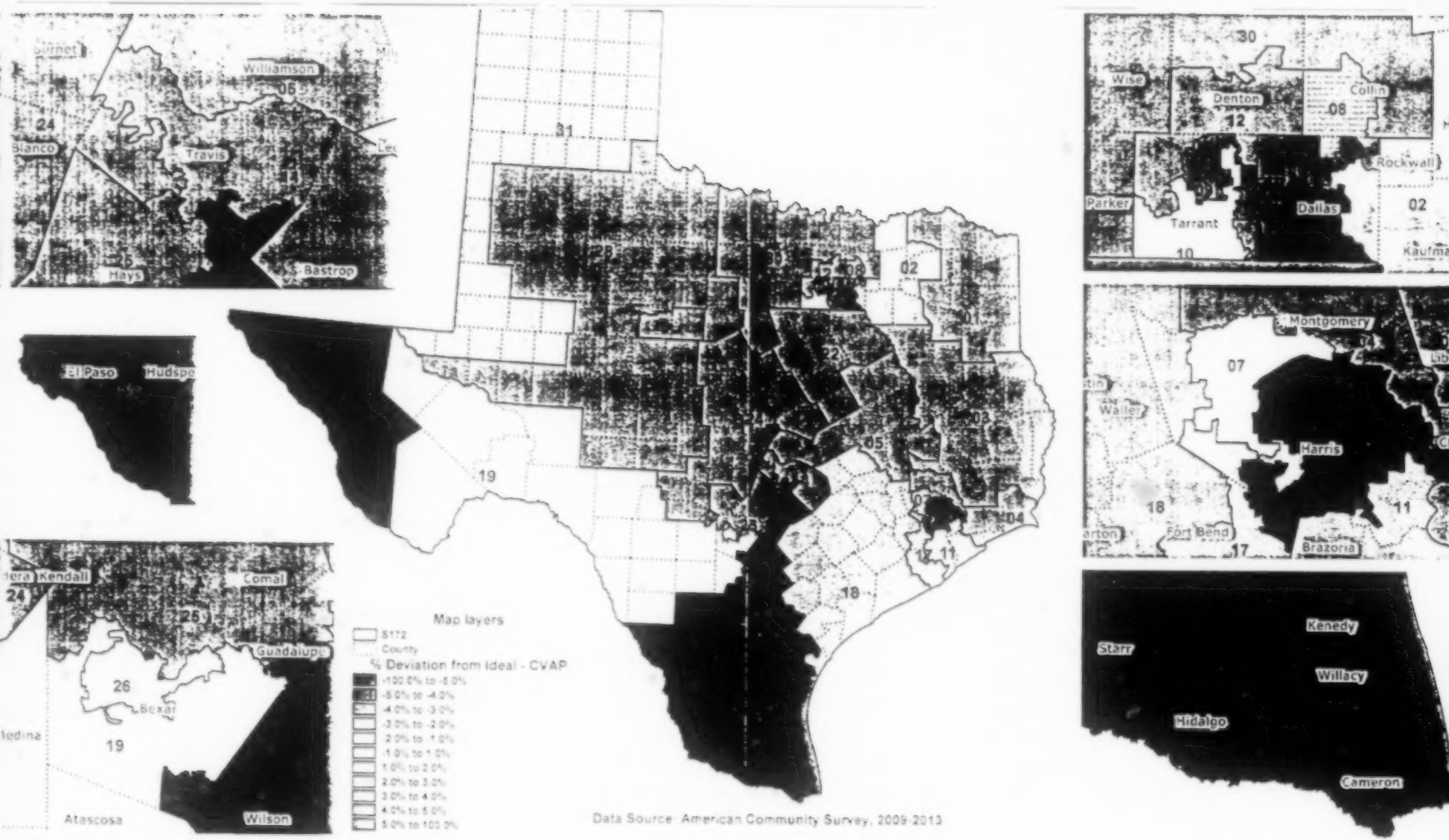
Plan H358: District Population Analysis, Page One ..... App. 25

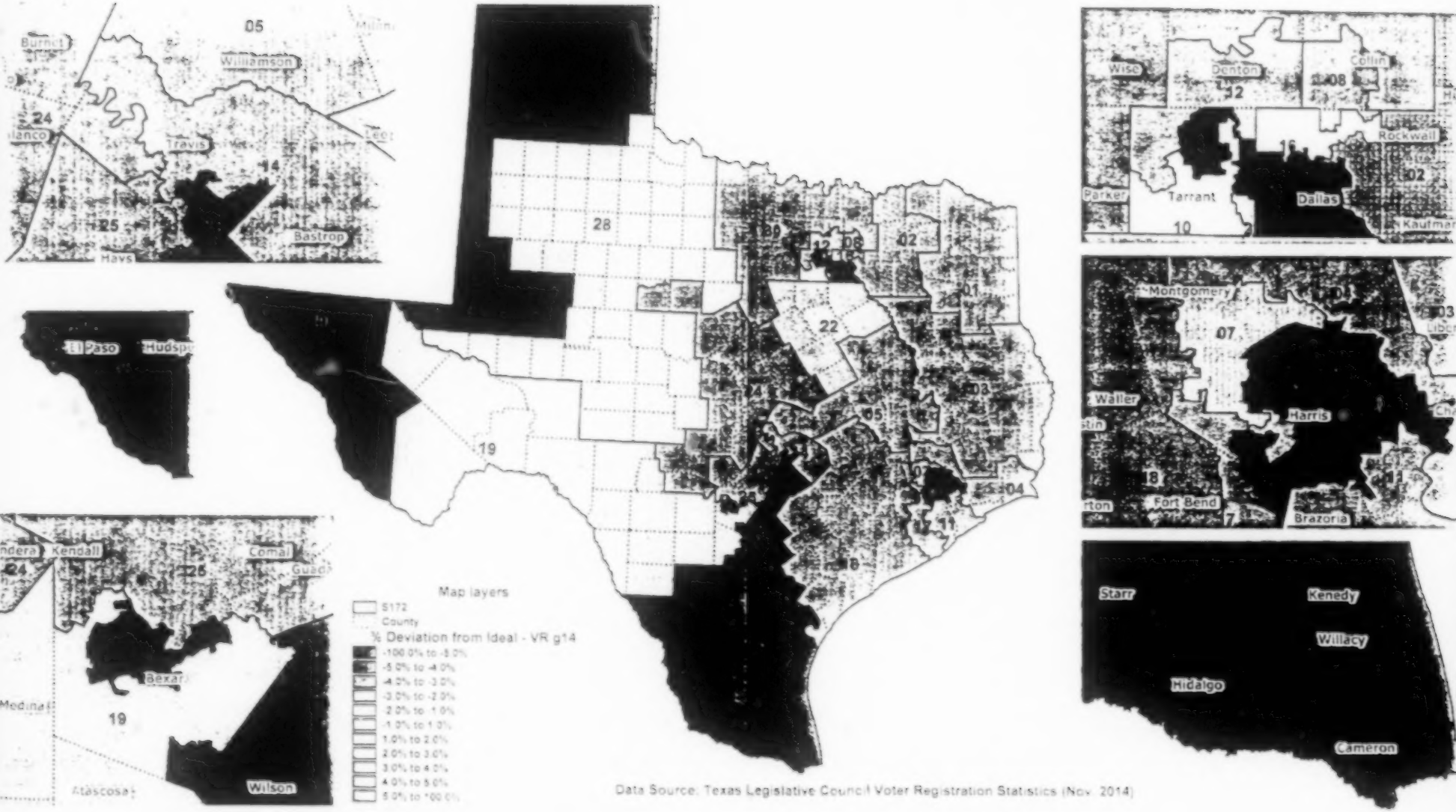
Plan H358: Hispanic Population Profile ..... App. 26

Plan H358: Population and Voter Data with VR Comparison ..... App. 31

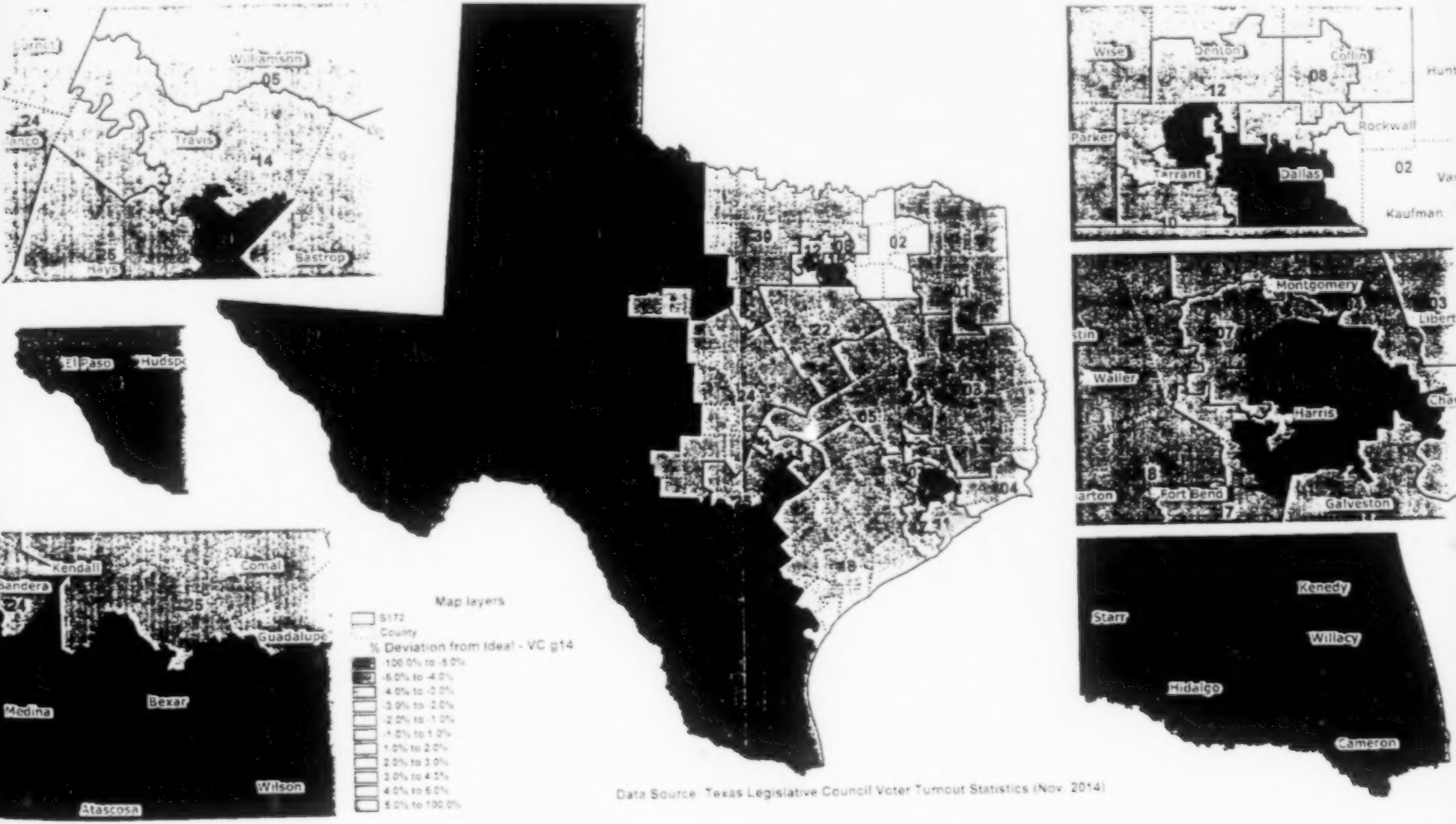
exas State Senate - S172 - District Variations in Voting Age Population



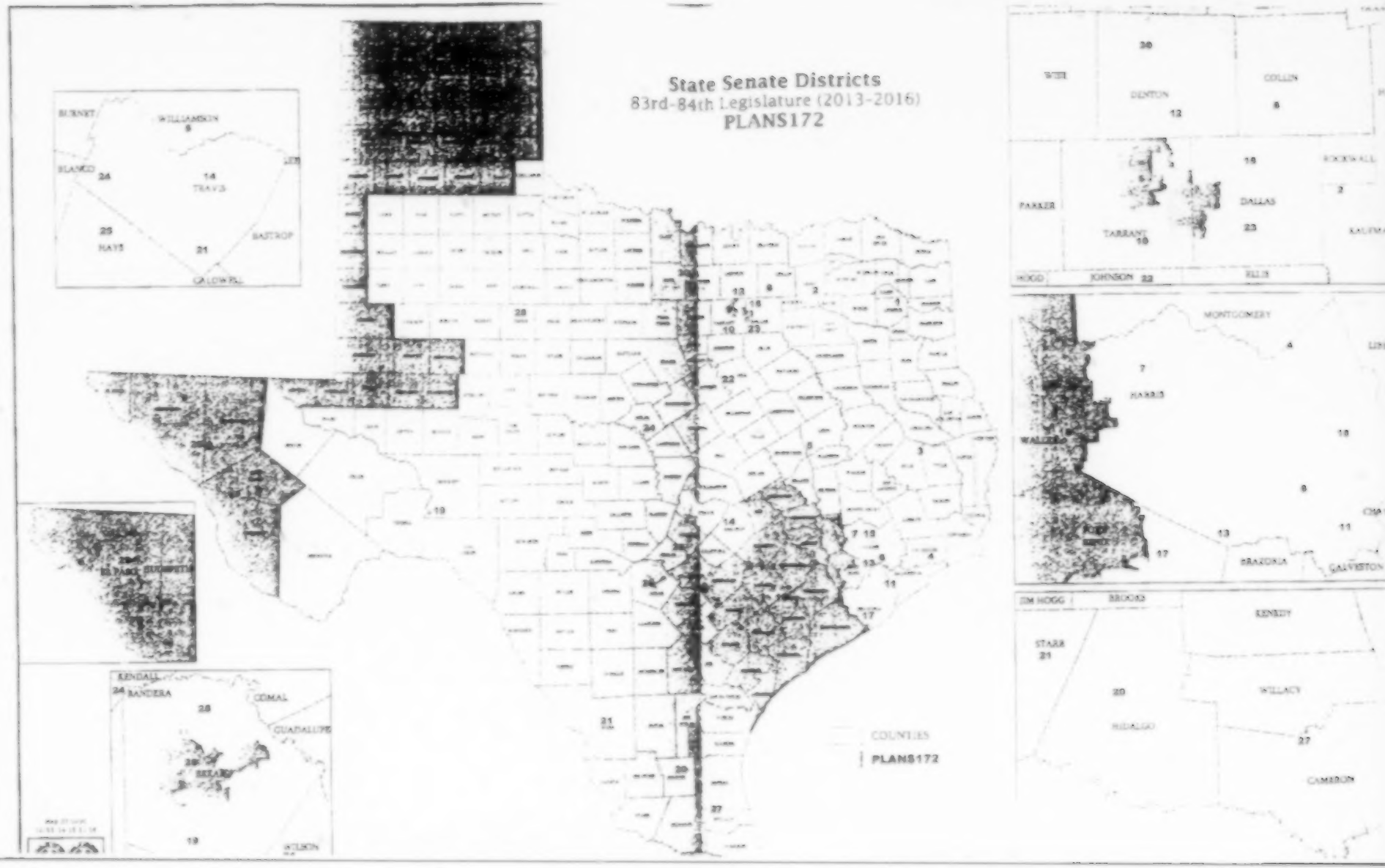

Williamson
Travis
Bastrop
Hays
Blanco
El Paso
Hudspe
Kendall
Comal
Guadalupe
Bexar
Atascosa
Wilson
Wise
Denton
Collin
Rockwall
Parker
Tarrant
Dallas
Montgomery
Waller
Harris
Fort Bend
Brazoria
Kenedy
Starr
Willacy
Hidalgo
Cameron
Map layers
S172
County
% Deviation from Ideal - CVAP
-100.0% to -6.0%
-5.0% to -4.0%
-4.0% to -3.0%
-3.0% to -2.0%
-2.0% to -1.0%
-1.0% to 1.0%
1.0% to 2.0%
2.0% to 3.0%
3.0% to 4.0%
4.0% to 5.0%
5.0% to 100.0%
Data Source: American Community Survey, 2009-2013



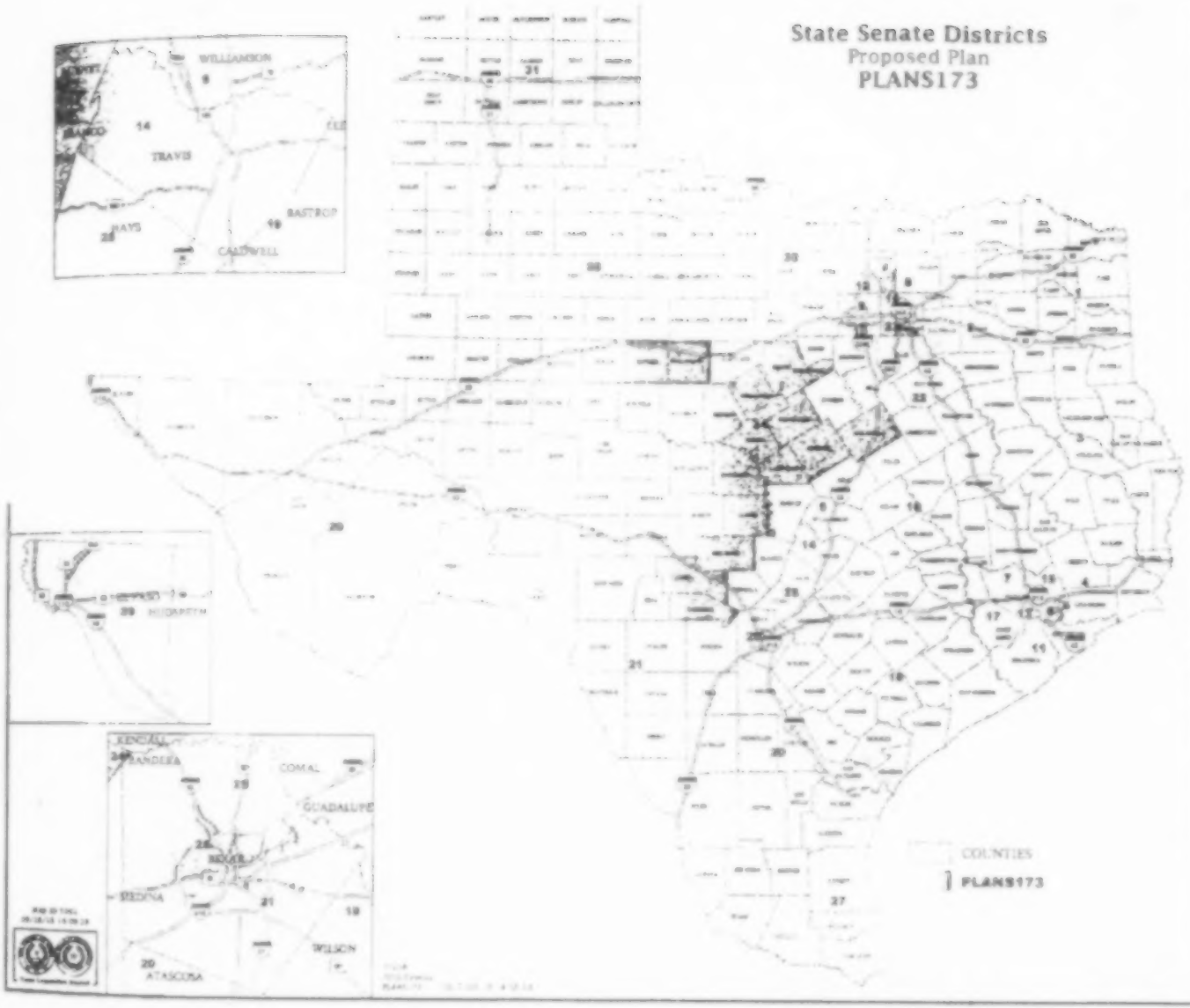
Data Source: Texas Legislative Council Voter Registration Statistics (Nov. 2014)

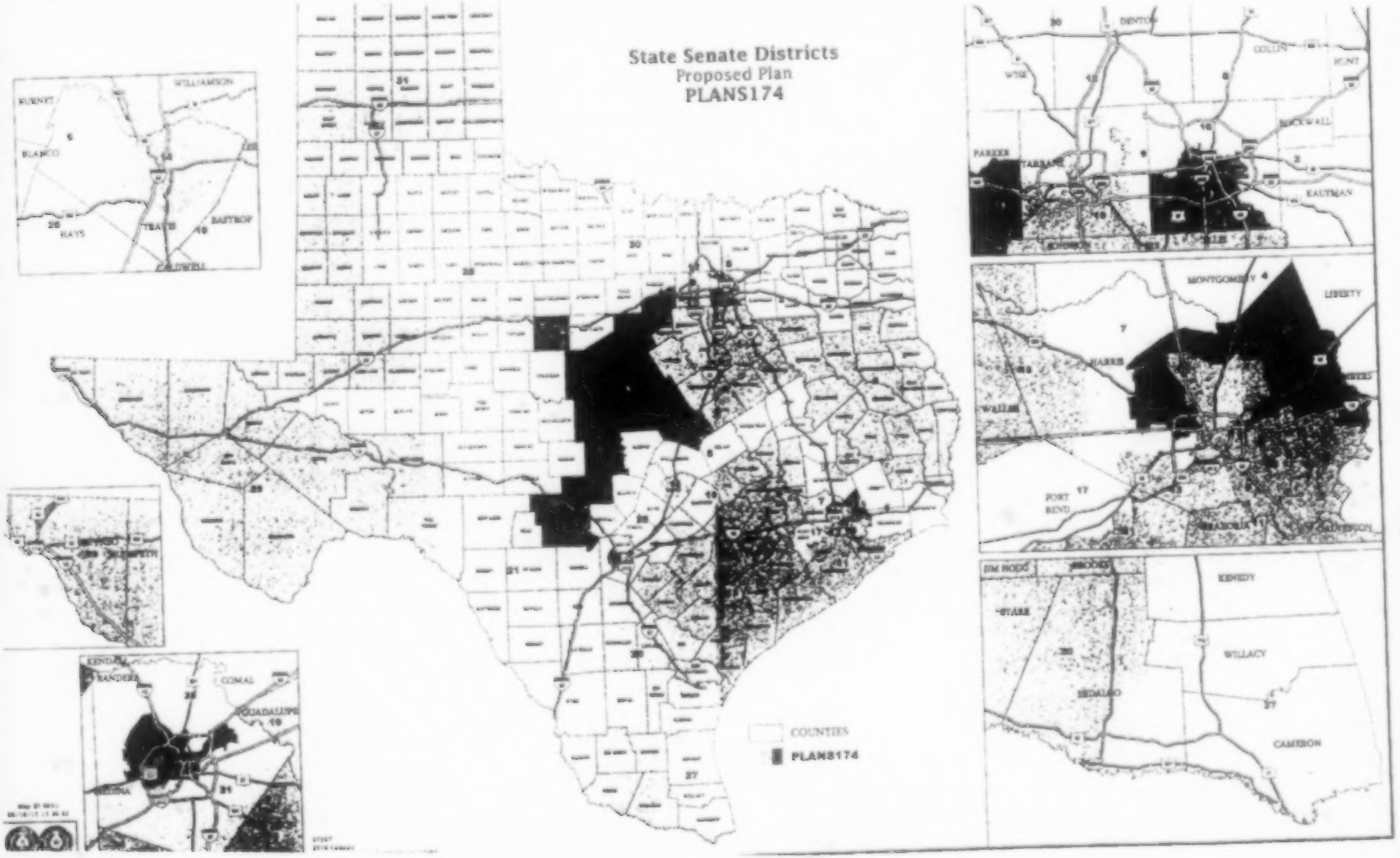


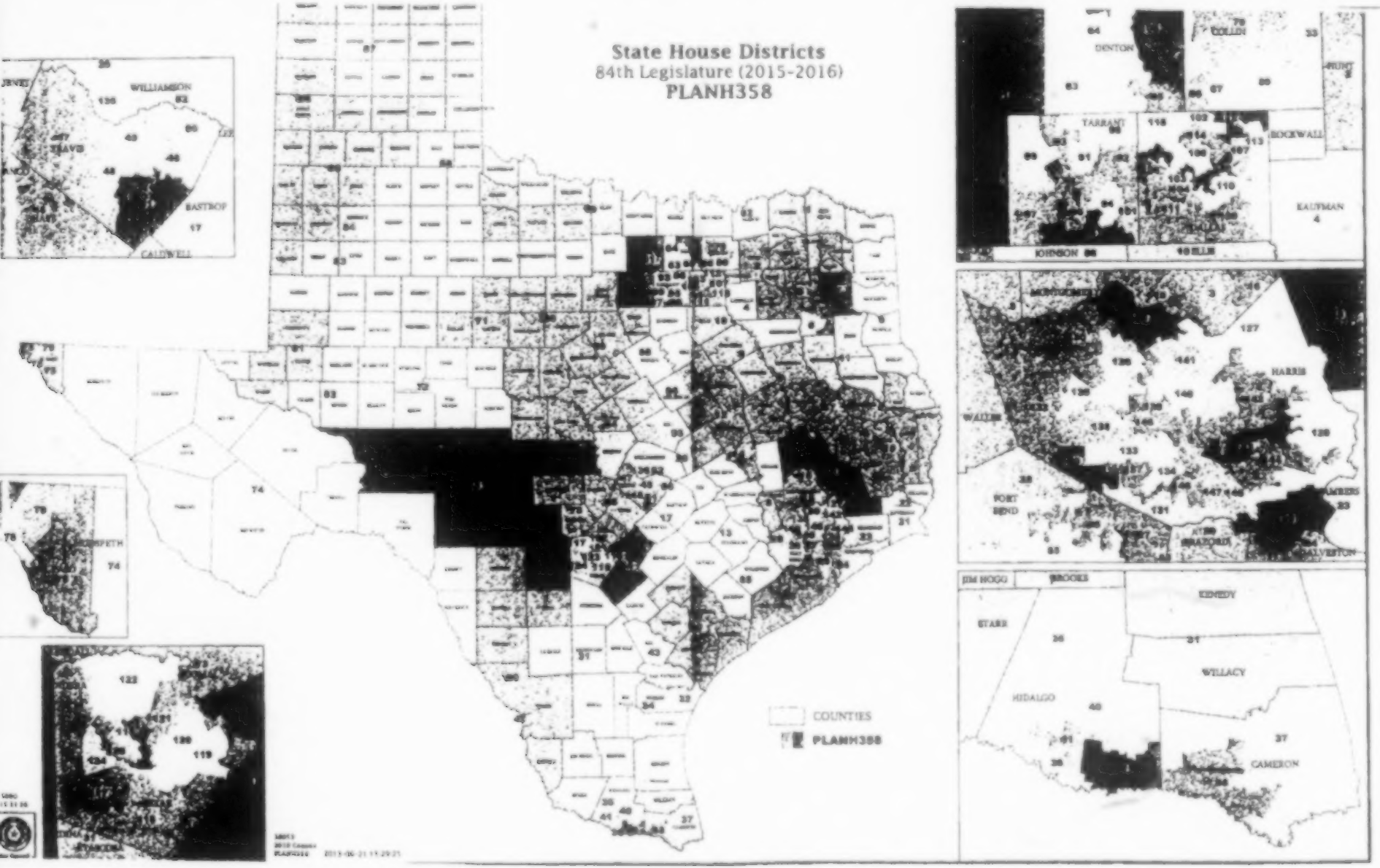
Data Source: Texas Legislative Council Voter Turnout Statistics (Nov. 2014)

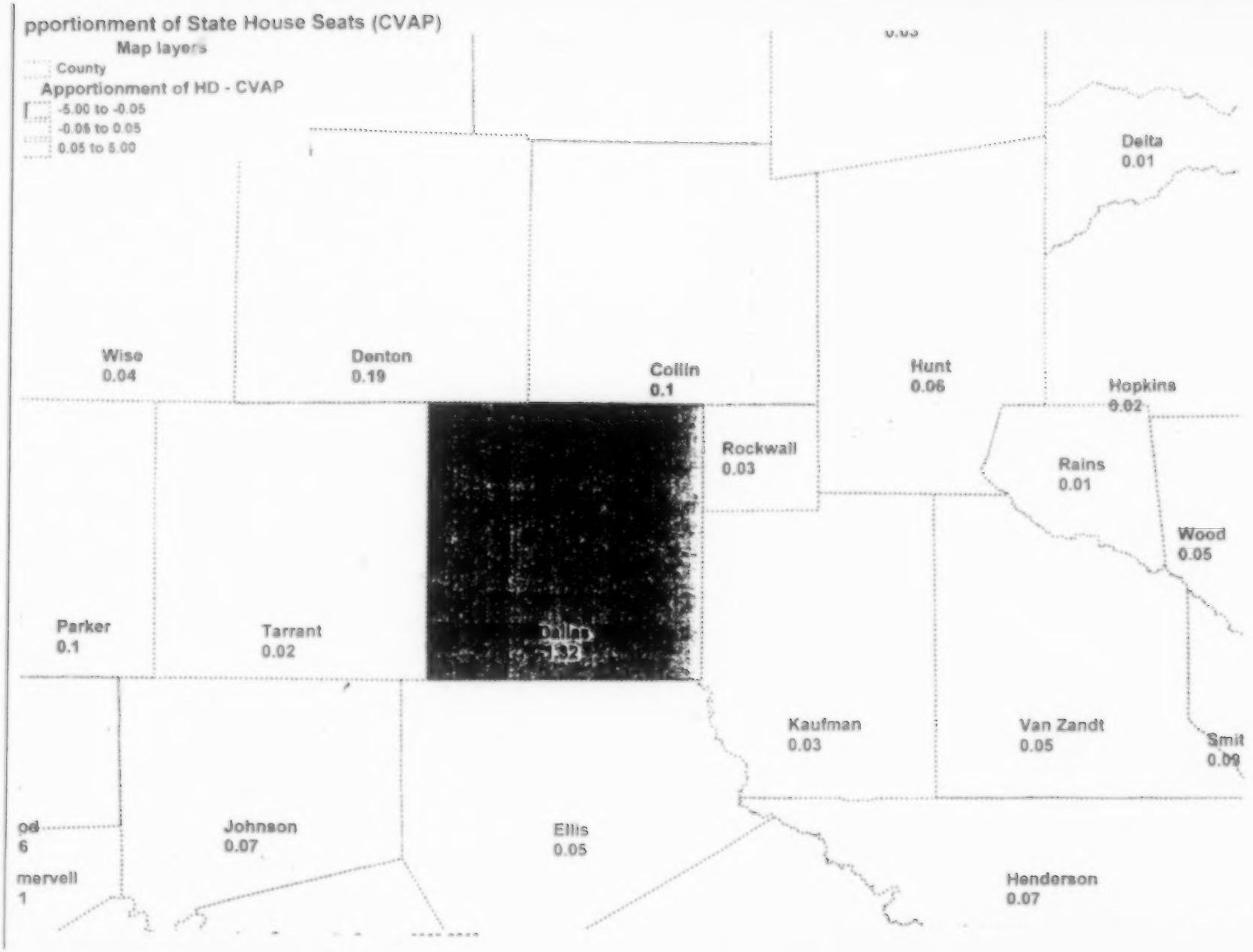

State Senate Districts
83rd-84th Legislature (2013-2016)
PLANS172
COUNTIES
PLANS172

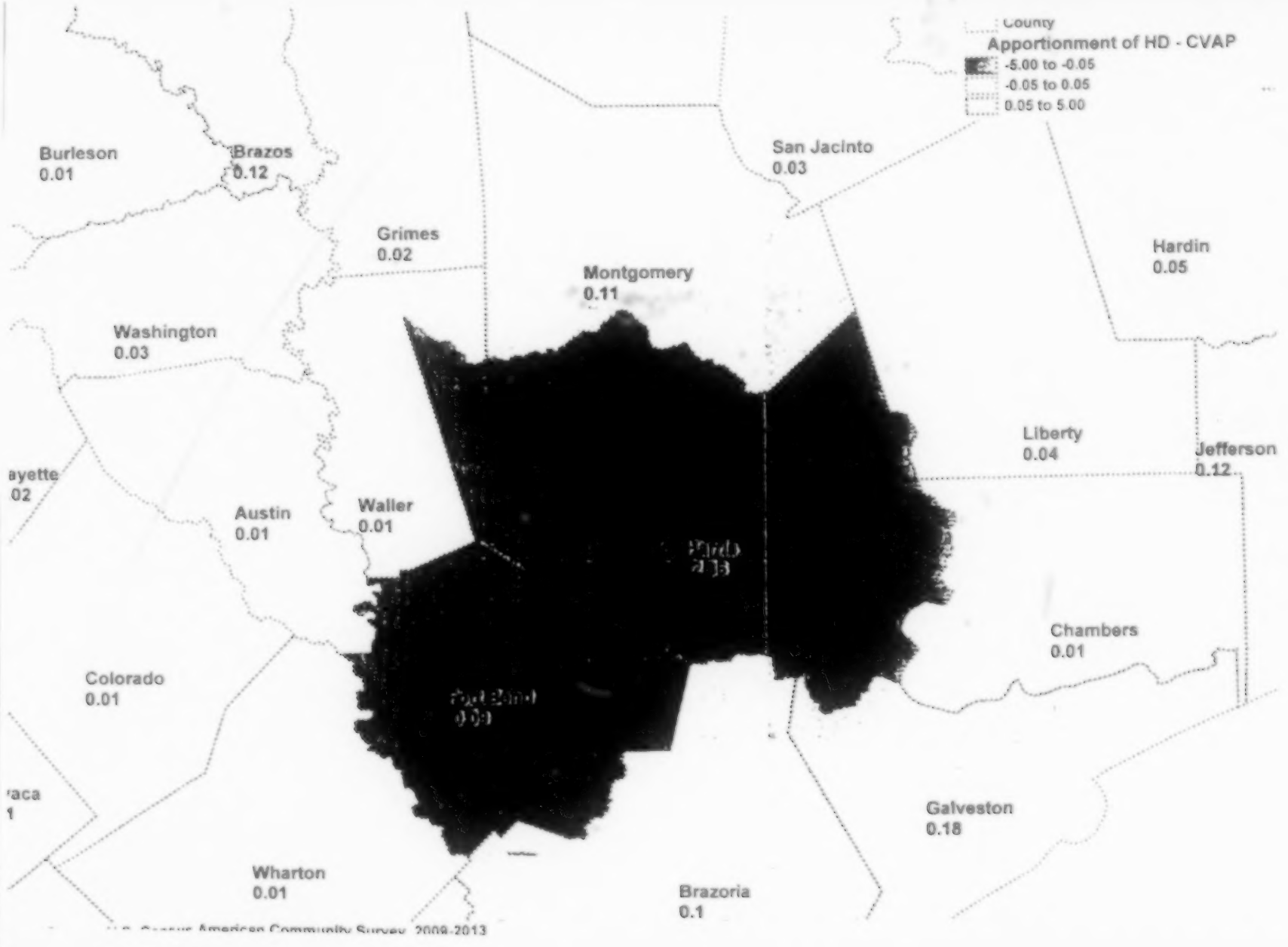
State Senate Districts
Proposed Plan
PLANS173

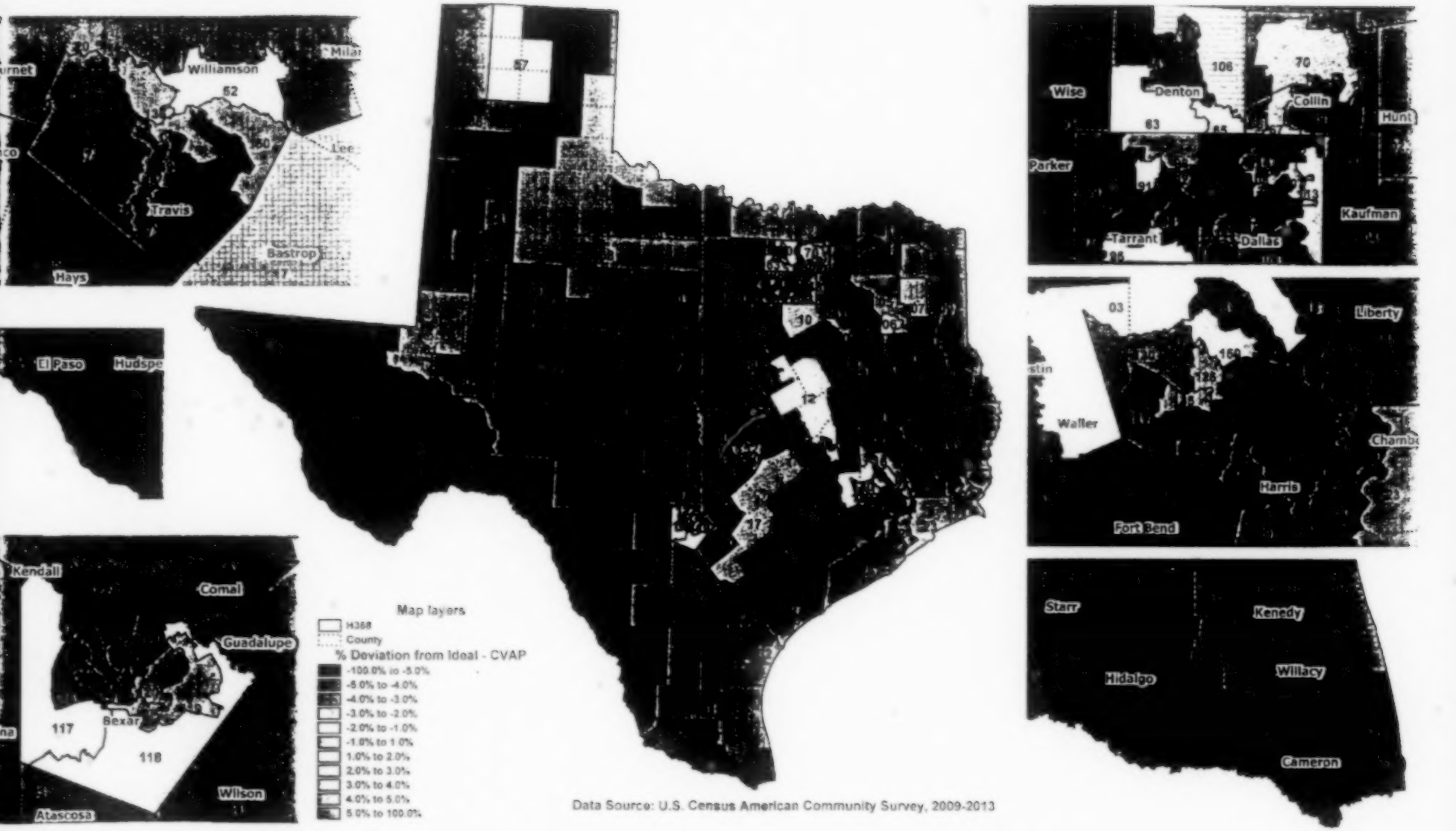



State Senate Districts
Proposed Plan
PLANS174
COUNTIES
PLANS174

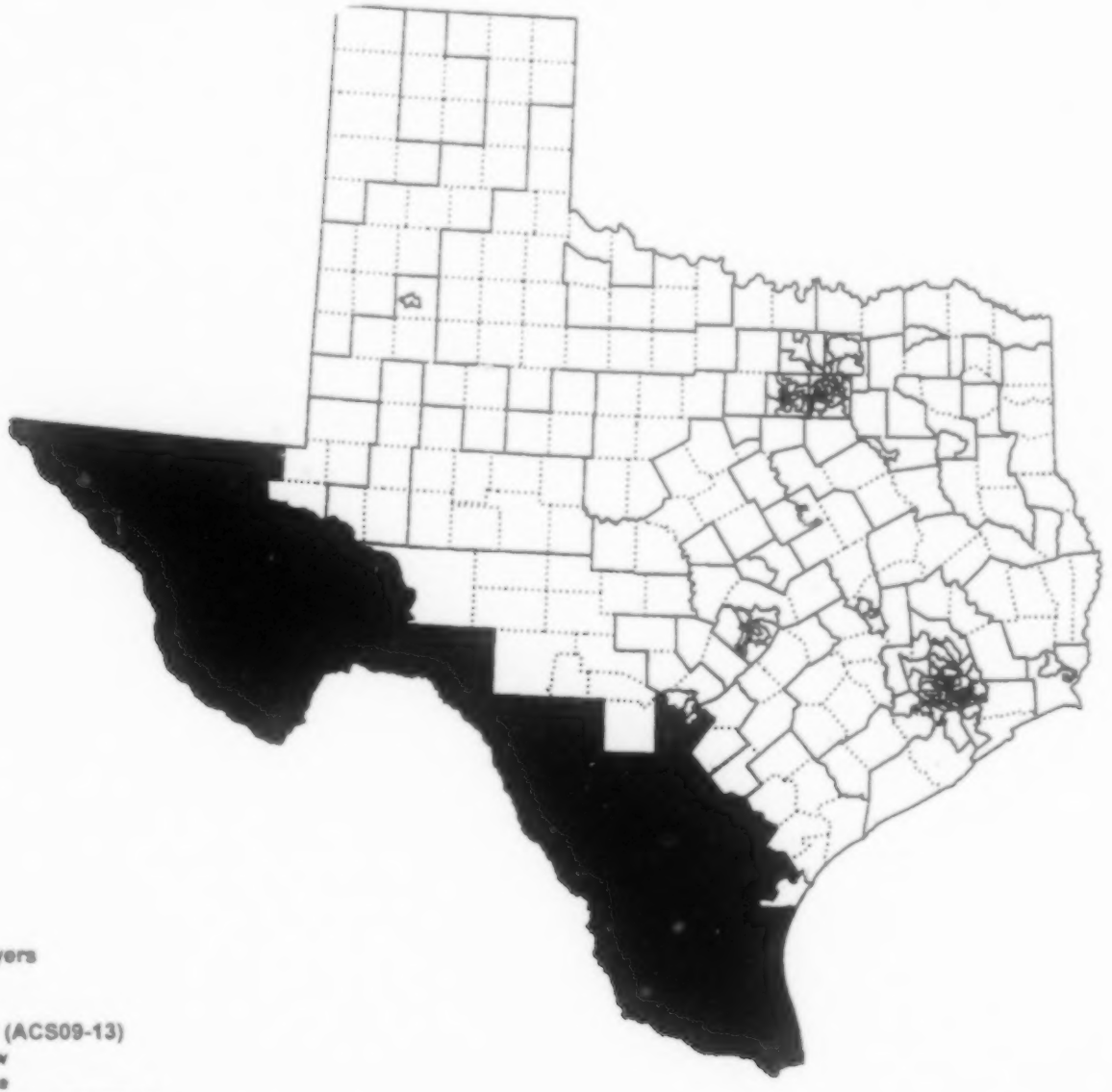

State House Districts
84th Legislature (2015-2016)
PLANH358
WILLIAMSON
BASTROP
CALDWELL
DENTON
COLLIN
TARRANT
ROCKWALL
KAUFMAN
JOHNSON
ELLIS
MONTGOMERY
HARRIS
WALLER
FORT BEND
GALVESTON
JIM HOGG
BROOKS
KENEDY
STARR
WILLACY
HIDALGO
CAMERON
COUNTIES
PLANH358


pportionment of State House Seats (CVAP)
Map layers
County
Apportionment of HD - CVAP
-5.00 to -0.05
-0.05 to 0.05
0.05 to 5.00
Delta
0.01
Wise
0.04
Denton
0.19
Collin
0.1
Hunt
0.06
Hopkins
0.02
Rockwall
0.03
Rains
0.01
Wood
0.05
Parker
0.1
Tarrant
0.02
Kaufman
0.03
Van Zandt
0.05
Johnson
0.07
Ellis
0.05
Henderson
0.07


County
Apportionment of HD - CVAP
-5.00 to -0.05
-0.05 to 0.05
0.05 to 5.00
Burleson
0.01
Brazos
0.12
San Jacinto
0.03
Grimes
0.02
Montgomery
0.11
Hardin
0.05
Washington
0.03
Liberty
0.04
Jefferson
0.12
ayette
02
Austin
0.01
Waller
0.01
Chambers
0.01
Colorado
0.01
aca
1
Galveston
0.18
Wharton
0.01
Brazoria
0.1



Data Source: U.S. Census American Community Survey, 2009-2013



Map layers

358

County

Latino CVAP (ACS09-13)

0.0% and below

0.0% and above

e: U.S. Census American Community Survey, 2009-2013

District Population Analysis with County Subtotals

SENATE DISTRICTS - PLANS172

Total State Population	25,145,561
Total Districts Required	31
Ideal District Population	811,147
Unassigned Population	0
Districts in Plan	31
Unassigned Geography	No
Districts Contiguous	Yes

	Population	Deviation	
		Total	Percent
Plan Overall Range		65,226	8.04%
Smallest District (28)	778,341	-32,806	-4.04%
Largest District (3)	843,567	32,420	4.00%
Average (mean)	811,147	11,696	1.44%

PLANS172

Using Census, 2009-2013 American Community Survey, Voter Registration, and Turnout Data

SENATE DISTRICTS - PLANS172

	2010 Census			2009-2013 ACS Special Tabulation				2014 General Election				
								Total Voter Registration		Non-Suspense Voter Registration		
District	Total	VAP	% HVAP	Citizen VAP	MOE	% HCVAP	MOE	Total	%SSVR	Total	%SSVR	%SSTO
1	819,976	616,458	10.5	583,460	(±5,816)	5.8	(±0.3%)	497,243	4.2	440,611	4.2	1.8
2	808,524	582,997	22.3	523,835	(±5,736)	14.2	(±0.5%)	439,074	11.2	390,638	11.4	6.5
3	843,567	641,369	10.6	611,435	(±6,495)	6.8	(±0.3%)	505,713	5.1	452,563	5.1	2.6
4	815,995	597,765	16.5	553,360	(±6,536)	10.8	(±0.4%)	503,371	8.7	447,431	8.8	5.2
5	827,039	620,718	18.9	584,895	(±6,551)	15.3	(±0.5%)	479,785	11.5	414,184	11.5	7.2
6	812,881	551,137	70.0	383,985	(±5,740)	57.9	(±0.9%)	295,657	53.3	266,440	54.8	41.6
7	809,277	572,446	23.4	507,735	(±6,257)	18.3	(±0.7%)	474,815	14.5	429,380	14.7	9.1
8	794,900	572,635	14.2	511,590	(±5,584)	9.6	(±0.4%)	483,465	7.0	429,113	6.9	4.8
9	815,389	580,100	28.4	496,875	(±5,809)	19.1	(±0.6%)	410,233	14.9	350,001	15.3	9.2
10	834,267	602,461	24.8	534,315	(±5,695)	16.9	(±0.5%)	466,356	13.6	407,874	13.9	8.2
11	791,770	582,677	22.9	544,820	(±6,164)	19.3	(±0.6%)	480,987	15.8	427,233	15.9	9.8
12	818,893	588,816	17.0	548,260	(±6,033)	11.9	(±0.4%)	496,907	9.6	427,665	9.7	6.1
13	808,680	590,736	34.4	427,820	(±6,059)	18.5	(±0.6%)	384,454	14.5	334,103	15.0	8.7
14	834,750	640,349	26.0	571,260	(±6,304)	19.0	(±0.5%)	541,379	14.3	451,743	14.4	10.6
15	793,108	574,255	38.3	475,055	(±5,938)	26.1	(±0.7%)	396,259	21.0	351,423	21.4	12.8
16	816,670	614,614	25.8	496,940	(±5,301)	14.8	(±0.5%)	447,405	11.0	387,527	11.0	6.7
17	804,162	605,764	20.2	527,825	(±6,046)	16.0	(±0.5%)	481,844	12.4	428,212	12.4	8.0
18	809,726	587,890	26.5	548,440	(±6,282)	22.3	(±0.6%)	504,363	18.6	454,142	18.5	10.0
19	800,501	566,604	63.0	516,115	(±6,353)	60.5	(±0.8%)	439,949	55.2	387,800	56.3	44.0
20	833,339	577,960	73.8	487,455	(±6,461)	70.3	(±0.8%)	401,209	66.7	355,270	67.9	57.1
21	807,460	567,099	67.9	475,255	(±5,881)	61.6	(±0.7%)	418,360	59.8	371,892	61.3	48.0
22	809,840	592,255	18.0	557,790	(±5,816)	13.4	(±0.5%)	472,149	11.1	412,977	11.1	5.5
23	813,699	576,192	38.7	466,660	(±5,770)	24.5	(±0.6%)	415,584	20.0	367,723	20.9	10.9
24	798,189	596,939	16.0	578,130	(±6,220)	14.3	(±0.5%)	480,171	10.5	406,382	10.3	5.3
25	815,771	610,120	26.5	602,120	(±6,200)	25.4	(±0.6%)	578,484	19.4	503,221	19.4	14.6
26	802,046	589,522	64.8	532,540	(±6,326)	61.9	(±0.7%)	413,406	55.6	353,238	57.1	47.9
27	786,946	524,120	86.2	399,530	(±6,104)	83.1	(±0.7%)	354,303	81.0	314,997	81.8	72.2
28	778,341	586,992	30.5	558,880	(±5,753)	28.4	(±0.6%)	441,652	25.5	381,755	25.5	10.9
29	816,681	571,426	79.6	469,130	(±5,851)	75.3	(±0.7%)	415,152	69.9	359,065	71.9	61.1
30	829,574	623,474	12.7	598,630	(±5,829)	9.0	(±0.3%)	505,597	6.9	447,746	6.9	3.5
31	793,600	573,847	32.8	523,600	(±5,315)	28.1	(±0.6%)	422,545	24.0	373,262	24.2	9.6

American Community Survey provided estimated citizen voting age population (CVAP) data at the block group level in a Special Tabulation. All block groups with more than 50% of the population in a district are included in the analysis.
= Margin of error at 90% confidence level
VAP = Hispanic voting age population / voting age population
CVAP = Hispanic citizen voting age population / citizen voting age population
R = Spanish surname voter registration (SSVR/VR)
O = Spanish surname turnout (SSTO/TO) data, starting with 2012, obtained from the Office of the Texas Secretary of State

Population and Voter Data with Voter Registration Comparison

SENATE DISTRICTS - PLANS172

District	Deviation		Population Total	%A	%B	%H	%BH	%O	General Election	Turnout	Total Voter Registration Total	SSVR	TO/VR	Non-Suspense Voter Registration Total	SSVR	TO/VR
1	8,829	Total:	819,976	66.8	18.2	13.2	31.1	2.1	2014	182,215	497,243	4.2 %	36.6 %	440,611	4.2 %	41.4 %
	1.09%	VAP:	616,458	70.5	17.2	10.5	27.6	2.0	2012	306,773	475,310	3.8 %	64.5 %	418,916	3.8 %	73.2 %
2	-2,623	Total:	808,524	57.1	13.3	26.6	39.4	3.5	2014	150,523	439,074	11.2 %	34.3 %	390,638	11.4 %	38.5 %
	-0.32%	VAP:	582,997	62.4	12.1	22.3	34.1	3.5	2012	257,196	412,870	10.1 %	62.3 %	361,596	10.3 %	71.1 %
3	32,420	Total:	843,567	72.5	13.0	12.9	25.7	1.8	2014	177,532	505,713	5.1 %	35.1 %	452,563	5.1 %	39.2 %
	4.00%	VAP:	641,369	75.3	12.5	10.6	23.0	1.7	2012	300,296	488,989	4.6 %	61.4 %	431,066	4.6 %	69.7 %
4	4,848	Total:	815,995	62.8	14.5	19.3	33.4	3.8	2014	186,788	503,371	8.7 %	37.1 %	447,431	8.8 %	41.7 %
	0.60%	VAP:	597,765	66.0	14.0	16.5	30.3	3.7	2012	309,126	469,683	8.0 %	65.8 %	412,057	8.0 %	75.0 %
5	15,892	Total:	827,039	62.4	11.0	21.9	32.4	5.2	2014	178,422	479,785	11.5 %	37.2 %	414,184	11.5 %	43.1 %
	1.96%	VAP:	620,718	66.1	10.3	18.9	28.9	5.1	2012	290,353	440,053	10.9 %	66.0 %	373,268	10.6 %	77.8 %
6	1,734	Total:	812,881	12.4	12.3	73.8	85.3	2.3	2014	66,812	295,657	53.3 %	22.6 %	266,440	54.8 %	25.1 %
	0.21%	VAP:	551,137	15.5	12.5	70.0	81.9	2.6	2012	138,163	283,768	52.1 %	48.7 %	246,328	53.8 %	56.1 %
7	-1,870	Total:	809,277	51.8	13.3	26.3	38.9	9.3	2014	173,281	474,815	14.5 %	36.5 %	429,380	14.7 %	40.4 %
	-0.23%	VAP:	572,446	55.6	12.1	23.4	35.0	9.3	2012	297,322	434,205	13.5 %	68.5 %	383,328	13.4 %	77.6 %
8	-16,247	Total:	794,900	58.8	10.9	16.2	26.7	14.4	2014	177,404	483,465	7.0 %	36.7 %	429,113	6.9 %	41.3 %
	-2.00%	VAP:	572,635	62.0	10.1	14.2	24.1	13.9	2012	303,092	441,969	6.4 %	68.6 %	377,647	6.2 %	80.3 %
9	4,242	Total:	815,389	48.1	12.5	32.7	44.6	7.3	2014	140,906	410,233	14.9 %	34.3 %	350,001	15.3 %	40.3 %
	0.52%	VAP:	580,100	53.0	11.6	28.4	39.6	7.4	2012	240,690	377,002	14.2 %	63.8 %	316,554	14.3 %	76.0 %
10	23,120	Total:	834,267	47.6	19.2	28.9	47.5	4.9	2014	183,259	466,356	13.6 %	39.3 %	407,874	13.9 %	44.9 %
	2.85%	VAP:	602,461	52.7	17.9	24.8	42.4	4.9	2012	292,584	423,211	13.2 %	69.1 %	362,545	13.4 %	80.7 %
11	-19,377	Total:	791,770	55.8	11.6	26.1	37.2	7.0	2014	166,744	480,987	15.8 %	34.7 %	427,233	15.9 %	39.0 %
	-2.39%	VAP:	582,677	59.6	10.9	22.9	33.5	6.9	2012	284,183	453,259	15.1 %	62.7 %	388,688	15.0 %	73.1 %
12	7,746	Total:	818,893	64.5	8.7	19.8	28.1	7.5	2014	176,338	496,907	9.6 %	35.5 %	427,665	9.7 %	41.2 %
	0.95%	VAP:	588,816	68.0	8.0	17.0	24.8	7.2	2012	300,031	448,838	8.9 %	66.8 %	385,617	8.8 %	77.8 %
13	-2,467	Total:	808,680	10.5	44.0	38.2	81.0	8.5	2014	115,518	384,454	14.5 %	30.0 %	334,103	15.0 %	34.6 %
	-0.30%	VAP:	590,736	12.8	44.3	34.4	77.7	9.5	2012	215,972	366,619	13.6 %	58.9 %	306,995	14.0 %	70.4 %
14	23,603	Total:	834,750	52.8	10.3	30.0	39.6	7.6	2014	223,687	541,379	14.3 %	41.3 %	451,743	14.4 %	49.5 %
	2.91%	VAP:	640,349	57.3	9.4	26.0	35.0	7.7	2012	321,116	495,331	13.6 %	64.8 %	405,934	13.6 %	79.1 %
15	-18,039	Total:	793,108	27.8	24.7	42.9	66.7	5.6	2014	127,108	396,259	21.0 %	32.1 %	351,423	21.4 %	36.2 %
	-2.22%	VAP:	574,255	32.8	23.6	38.3	61.2	6.0	2012	227,401	368,386	20.1 %	61.7 %	315,233	20.4 %	72.1 %
16	5,523	Total:	816,670	48.3	11.8	30.0	41.3	10.4	2014	170,569	447,405	11.0 %	38.1 %	387,527	11.0 %	44.0 %
	0.68%	VAP:	614,614	53.0	11.1	25.8	36.6	10.4	2012	281,985	420,581	10.2 %	67.0 %	359,919	10.1 %	78.3 %
17	-6,985	Total:	804,162	49.3	13.8	22.5	35.8	15.0	2014	183,392	481,844	12.4 %	38.1 %	428,212	12.4 %	42.8 %
	-0.86%	VAP:	605,764	52.5	12.8	20.2	32.6	14.9	2012	302,335	456,491	11.8 %	66.2 %	396,029	11.6 %	76.3 %
18	-1,421	Total:	809,726	50.6	12.8	30.1	42.2	7.2	2014	182,646	504,363	18.6 %	36.2 %	454,142	18.5 %	40.2 %
	-0.18%	VAP:	587,890	55.0	12.0	26.5	38.2	6.8	2012	295,343	469,170	18.4 %	63.0 %	415,749	18.1 %	71.0 %
19	-10,646	Total:	800,501	24.4	7.5	66.7	73.4	2.3	2014	122,016	439,949	55.2 %	27.7 %	387,800	56.3 %	31.5 %
	-1.31%	VAP:	566,604	27.8	7.3	63.0	69.8	2.4	2012	215,427	408,198	55.2 %	52.8 %	354,425	56.3 %	60.8 %
20	22,192	Total:	833,339	18.6	2.4	77.5	79.4	2.0	2014	112,687	401,209	66.7 %	28.1 %	355,270	67.9 %	31.7 %
	2.74%	VAP:	577,960	22.1	2.3	73.8	75.8	2.1	2012	191,147	377,113	65.3 %	50.7 %	316,572	66.7 %	60.4 %

For technical reasons, election results in Texas Legislative Council reports may vary slightly from the official election results. Complete official results for all elections are maintained by the Office of the Texas Secretary of State.
SSVR = Spanish surname voter registration

WIII Voter Registration Comparison

SENATE DISTRICTS - PLANS172

District	Deviation		Population Total	%A	%B	%H	%BH	%O	General Election	Turnout	Total Voter Registration Total	SSVR	TO/VR	Non-Suspense Voter Registration Total	SSVR	TO/VR
21	-3,687	Total:	807,460	22.9	3.9	72.3	75.7	1.4	2014	119,215	418,360	59.8 %	28.5 %	371,892	61.3 %	32.1 %
	-0.45%	VAP:	567,099	26.9	4.0	67.9	71.5	1.6	2012	200,562	394,251	59.6 %	50.9 %	337,802	61.0 %	59.4 %
22	-1,307	Total:	809,840	63.1	12.4	21.5	33.5	3.4	2014	165,504	472,149	11.1 %	35.1 %	412,977	11.1 %	40.1 %
	-0.16%	VAP:	592,255	67.6	11.3	18.0	29.0	3.3	2012	275,324	447,474	10.4 %	61.5 %	392,142	10.2 %	70.2 %
23	2,552	Total:	813,699	14.8	40.4	43.5	83.2	2.0	2014	127,589	415,584	20.0 %	30.7 %	367,723	20.9 %	34.7 %
	0.31%	VAP:	576,192	18.7	40.9	38.7	79.1	2.2	2012	235,868	390,137	19.1 %	60.5 %	341,146	19.9 %	69.1 %
24	-12,958	Total:	798,189	65.3	12.7	19.0	30.7	3.9	2014	167,750	480,171	10.5 %	34.9 %	406,382	10.3 %	41.3 %
	-1.60%	VAP:	596,939	69.8	10.9	16.0	26.4	3.8	2012	278,379	455,375	10.1 %	61.1 %	379,745	9.7 %	73.3 %
25	4,624	Total:	815,771	61.7	5.0	29.6	34.1	4.3	2014	241,104	578,484	19.4 %	41.7 %	503,221	19.4 %	47.9 %
	0.57%	VAP:	610,120	65.2	4.5	26.5	30.7	4.1	2012	366,670	531,438	18.5 %	69.0 %	454,561	18.2 %	80.7 %
26	-9,101	Total:	802,046	21.2	8.1	68.4	75.5	3.3	2014	116,536	413,406	55.6 %	28.2 %	353,238	57.1 %	33.0 %
	-1.12%	VAP:	589,522	24.8	7.6	64.8	71.7	3.5	2012	207,960	388,282	55.3 %	53.6 %	320,974	56.6 %	64.8 %
27	-24,201	Total:	786,946	9.6	0.8	89.1	89.5	0.8	2014	84,566	354,303	81.0 %	23.9 %	314,907	81.8 %	26.8 %
	-2.98%	VAP:	524,120	12.4	0.8	86.2	86.7	1.0	2012	150,633	327,094	79.9 %	46.1 %	281,423	80.9 %	53.5 %
28	-32,806	Total:	778,341	57.1	6.5	34.9	40.8	2.1	2014	135,851	441,652	25.5 %	30.8 %	381,755	25.5 %	35.6 %
	-4.04%	VAP:	586,992	61.6	5.9	30.5	36.2	2.2	2012	251,138	430,544	24.9 %	58.3 %	366,194	24.6 %	68.6 %
29	5,534	Total:	816,681	13.3	3.6	82.0	84.9	1.8	2014	83,529	415,152	69.9 %	20.1 %	359,065	71.9 %	23.3 %
	0.68%	VAP:	571,426	15.6	3.4	79.6	82.5	1.9	2012	177,498	364,869	69.9 %	48.6 %	310,078	71.6 %	57.2 %
30	18,427	Total:	829,574	76.0	5.8	15.3	20.9	3.2	2014	160,417	505,597	6.9 %	31.7 %	447,746	6.9 %	35.8 %
	2.27%	VAP:	623,474	79.0	5.3	12.7	17.8	3.1	2012	297,514	476,950	6.3 %	62.4 %	406,876	6.1 %	73.1 %
31	-17,547	Total:	793,600	54.8	5.4	37.6	42.6	2.7	2014	127,897	422,545	24.0 %	30.3 %	373,262	24.2 %	34.3 %
	-2.16%	VAP:	573,847	59.9	4.9	32.8	37.5	2.7	2012	237,139	404,586	22.7 %	58.6 %	351,115	22.6 %	67.5 %

For technical reasons, election results in Texas Legislative Council reports may vary slightly from the official election results. Complete official results for all elections are maintained by the Office of the Texas Secretary of State.
SSVR = Spanish surname voter registration

District Population Analysis with County Subtotals

SENATE DISTRICTS - PLANS173

Total State Population	25,145,561
Total Districts Required	31
Ideal District Population	811,147
Unassigned Population	0
Districts in Plan	31
Unassigned Geography	No
Districts Contiguous	Yes

	Population	--------Deviation--------	
		Total	Percent
Plan Overall Range		294,902	36.36%
Smallest District (24)	707,313	-103,834	-12.80%
Largest District (6)	1,002,215	191,068	23.56%
Average (mean)	811,147	61,942	7.64%

PLANS173

Hispanic Population Profile
Using Census, 2009-2013 American Community Survey, Voter Registration, and Turnout Data
~~SENATE DISTRICTS~~ - PLANS173

	2010 Census			2009-2013 ACS Special Tabulation				2014 General Election				
								Total Voter Registration		Non-Suspense Voter Registration		
District	Total	VAP	% HVAP	Citizen VAP	MOE	% HCVAP	MOE	Total	%SSVR	Total	%SSVR	%SSTO
1	742,850	557,581	10.5	527,395	(±5,551)	5.9	(±0.3%)	451,115	4.3	399,415	4.3	1.8
2	802,216	570,873	23.1	515,325	(±5,815)	14.7	(±0.5%)	442,631	11.6	395,236	11.8	6.7
3	728,459	553,726	10.5	527,270	(±5,856)	6.6	(±0.3%)	432,215	4.8	389,031	4.8	2.4
4	757,143	558,370	16.2	517,265	(±6,383)	10.4	(±0.4%)	461,045	8.0	407,747	8.1	4.5
5	745,032	534,628	19.2	516,620	(±6,177)	16.8	(±0.6%)	459,775	12.2	391,812	12.2	7.6
6	1,002,215	690,559	61.1	512,765	(±6,374)	48.7	(±0.8%)	404,782	43.6	364,978	44.7	30.0
7	807,497	574,662	22.2	512,865	(±6,207)	17.1	(±0.6%)	480,509	13.8	433,449	13.9	8.7
8	810,254	583,309	14.8	518,540	(±5,633)	9.8	(±0.4%)	489,247	7.1	434,346	7.1	4.9
9	807,718	576,400	22.6	512,570	(±5,998)	15.3	(±0.6%)	435,622	12.1	369,657	12.2	7.7
10	820,292	593,518	25.2	525,660	(±5,669)	17.1	(±0.5%)	456,059	13.9	398,862	14.2	8.4
11	772,140	564,097	22.2	534,730	(±6,127)	19.0	(±0.6%)	476,314	15.5	422,903	15.7	9.4
12	781,312	560,464	17.0	522,475	(±5,879)	12.0	(±0.5%)	474,212	9.7	408,853	9.8	6.1
13	918,018	680,964	31.9	508,920	(±6,393)	17.5	(±0.6%)	461,048	13.6	401,147	14.0	8.4
14	758,397	586,571	25.4	522,405	(±5,788)	18.3	(±0.5%)	503,028	13.5	418,486	13.6	10.2
15	873,142	623,663	36.1	523,310	(±6,266)	24.5	(±0.7%)	446,669	19.7	399,881	20.0	11.7
16	859,214	643,992	27.6	514,235	(±5,372)	15.7	(±0.5%)	461,529	11.7	400,046	11.8	7.1
17	825,395	611,296	21.2	521,540	(±6,384)	16.9	(±0.6%)	491,524	13.0	435,279	13.0	8.5
18	759,227	558,055	30.4	531,755	(±5,991)	26.5	(±0.7%)	470,333	22.3	424,549	22.3	12.4
19	767,144	576,022	28.4	519,880	(±6,221)	22.0	(±0.6%)	426,932	18.4	365,688	18.5	12.4
20	926,601	638,985	77.0	530,075	(±6,692)	73.7	(±0.7%)	451,799	71.8	405,048	72.7	61.8
21	874,549	599,223	72.3	519,555	(±6,459)	68.9	(±0.7%)	452,444	64.2	403,651	65.4	54.8
22	739,088	554,640	14.2	529,210	(±5,782)	9.9	(±0.4%)	443,377	8.1	393,352	8.0	3.9
23	910,844	642,214	39.4	520,420	(±6,097)	26.0	(±0.6%)	456,667	20.9	404,335	21.8	11.5
24	707,313	536,656	17.2	515,120	(±5,460)	14.4	(±0.5%)	411,945	11.4	352,336	11.3	5.2
25	711,200	534,870	29.7	522,655	(±5,917)	28.4	(±0.7%)	493,233	21.9	424,503	22.0	16.3
26	802,158	589,629	64.8	532,540	(±6,326)	61.9	(±0.7%)	413,475	55.6	353,297	57.1	47.9
27	963,669	656,632	78.5	530,430	(±6,849)	74.5	(±0.7%)	455,215	72.4	401,879	73.5	61.3
28	738,365	558,078	30.5	532,240	(±5,634)	28.4	(±0.6%)	421,136	25.5	364,486	25.5	10.9
29	908,785	638,913	78.4	526,450	(±6,164)	74.0	(±0.6%)	466,724	68.8	404,361	70.7	59.1
30	731,724	557,300	12.2	528,700	(±5,335)	8.8	(±0.4%)	434,722	6.6	383,736	6.6	3.3
31	793,600	573,847	32.8	523,600	(±5,315)	28.1	(±0.6%)	422,545	24.0	373,262	24.2	9.6

The American Community Survey provided estimated citizen voting age population (CVAP) data at the block group level in a Special Tabulation. All block groups with more than 50% of the population in a district are included in the analysis.
MOE = Margin of error at 90% confidence level
% HVAP = Hispanic voting age population / voting age population
% HCVAP = Hispanic citizen voting age population / citizen voting age population
SSVR = Spanish surname voter registration (SSVR/VR)
SSTO = Spanish surname turnout (SSTO/TO) data, starting with 2012, obtained from the Office of the Texas Secretary of State

Population and Voter Data
with Voter Registration Comparison
SENATE DISTRICTS - PLANS173

District	Deviation		Population Total	%A	%B	%H	%BH	%O	General Election	Turnout	Total Voter Registration Total	SSVR	TO/VR	Non-Suspense Voter Registration Total	SSVR	TO/VR
1	-68,297	Total:	742,850	66.6	18.2	13.3	31.2	2.1	2014	165,816	451,115	4.3 %	36.8 %	399,415	4.3 %	41.5 %
	-8.42%	VAP:	557,581	70.4	17.2	10.5	27.5	2.0	2012	277,823	429,821	3.8 %	64.6 %	378,811	3.8 %	73.3 %
2	-8,931	Total:	802,216	56.5	13.1	27.3	39.9	3.6	2014	154,122	442,631	11.6 %	34.8 %	395,236	11.8 %	39.0 %
	-1.10%	VAP:	570,873	61.7	11.8	23.1	34.7	3.6	2012	261,211	410,041	10.6 %	63.7 %	359,867	10.7 %	72.6 %
3	-82,688	Total:	728,459	70.9	14.8	12.8	27.4	1.7	2014	150,843	432,215	4.8 %	34.9 %	389,031	4.8 %	38.8 %
	-10.19%	VAP:	553,726	73.6	14.3	10.5	24.7	1.7	2012	259,006	418,377	4.4 %	61.9 %	371,724	4.3 %	69.7 %
4	-54,004	Total:	757,143	62.4	15.4	19.0	34.0	3.5	2014	168,504	461,045	8.0 %	36.5 %	407,747	8.1 %	41.3 %
	-6.66%	VAP:	558,370	65.7	14.9	16.2	30.9	3.4	2012	279,141	432,294	7.4 %	64.6 %	378,281	7.4 %	73.8 %
5	-66,115	Total:	745,032	60.4	12.6	22.2	33.8	5.8	2014	163,453	459,775	12.2 %	35.6 %	391,812	12.2 %	41.7 %
	-8.15%	VAP:	534,628	64.6	11.1	19.2	29.7	5.7	2012	267,726	418,291	11.7 %	64.0 %	349,278	11.5 %	76.7 %
6	191,068	Total:	1,002,215	21.4	10.8	65.5	75.5	3.1	2014	107,076	404,782	43.6 %	26.5 %	364,978	44.7 %	29.3 %
	23.56%	VAP:	690,559	25.4	10.7	61.1	71.2	3.3	2012	206,295	389,382	42.3 %	53.0 %	338,879	43.4 %	60.9 %
7	-3,650	Total:	807,497	53.9	12.5	25.0	36.9	9.2	2014	176,706	480,509	13.8 %	36.8 %	433,449	13.9 %	40.8 %
	-0.45%	VAP:	574,662	57.6	11.4	22.2	33.2	9.2	2012	301,853	439,030	12.8 %	68.8 %	386,992	12.7 %	78.0 %
8	-893	Total:	810,254	58.2	10.9	16.8	27.4	14.5	2014	179,024	489,247	7.1 %	36.6 %	434,346	7.1 %	41.2 %
	-0.11%	VAP:	583,309	61.4	10.1	14.8	24.6	14.0	2012	306,204	447,378	6.6 %	68.4 %	382,447	6.4 %	80.1 %
9	-3,429	Total:	807,718	51.9	14.1	26.2	39.7	8.4	2014	153,527	435,622	12.1 %	35.2 %	369,657	12.2 %	41.5 %
	-0.42%	VAP:	576,400	56.4	13.0	22.6	35.3	8.3	2012	260,958	398,049	11.5 %	65.6 %	332,959	11.4 %	78.4 %
10	9,145	Total:	820,292	46.9	19.5	29.3	48.2	4.9	2014	178,864	456,059	13.9 %	39.2 %	398,862	14.2 %	44.8 %
	1.13%	VAP:	593,518	52.2	18.2	25.2	42.9	4.9	2012	285,255	413,324	13.5 %	69.0 %	353,753	13.6 %	80.6 %
11	-39,007	Total:	772,140	54.5	13.7	25.2	38.4	7.1	2014	164,164	476,314	15.5 %	34.5 %	422,903	15.7 %	38.8 %
	-4.81%	VAP:	564,097	58.2	13.0	22.2	34.9	6.9	2012	277,603	445,294	15.0 %	62.3 %	381,614	15.0 %	72.7 %
12	-29,835	Total:	781,312	64.2	8.9	19.8	28.2	7.6	2014	167,532	474,212	9.7 %	35.3 %	408,853	9.8 %	41.0 %
	-3.68%	VAP:	560,464	67.7	8.2	17.0	24.9	7.4	2012	285,434	427,936	9.0 %	66.7 %	368,315	8.9 %	77.5 %
13	106,871	Total:	918,018	16.8	39.8	35.7	74.5	8.7	2014	148,682	461,048	13.6 %	32.2 %	401,147	14.0 %	37.1 %
	13.18%	VAP:	680,964	19.9	39.4	31.9	70.6	9.6	2012	266,941	439,341	12.9 %	60.8 %	368,885	13.2 %	72.4 %
14	-52,750	Total:	758,397	53.8	9.7	29.2	38.2	8.0	2014	210,545	503,028	13.5 %	41.9 %	418,486	13.6 %	50.3 %
	-6.50%	VAP:	586,571	58.2	8.9	25.4	33.8	8.0	2012	301,206	461,314	12.9 %	65.3 %	375,716	12.8 %	80.2 %
15	61,995	Total:	873,142	32.4	23.0	40.3	62.4	5.2	2014	147,930	446,669	19.7 %	33.1 %	399,881	20.0 %	37.0 %
	7.64%	VAP:	623,663	36.9	22.1	36.1	57.7	5.5	2012	261,545	417,004	18.7 %	62.7 %	361,640	18.8 %	72.3 %
16	48,067	Total:	859,214	47.1	11.4	32.1	43.0	9.9	2014	174,805	461,529	11.7 %	37.9 %	400,046	11.8 %	43.7 %
	5.93%	VAP:	643,992	52.1	10.7	27.6	38.0	9.9	2012	289,471	434,354	10.9 %	66.6 %	372,183	10.8 %	77.8 %
17	14,248	Total:	825,395	44.4	15.1	23.2	37.7	17.9	2014	182,257	491,524	13.0 %	37.1 %	435,279	13.0 %	41.9 %
	1.76%	VAP:	611,296	47.5	14.0	21.2	34.7	17.8	2012	303,078	453,450	12.6 %	66.8 %	394,029	12.4 %	76.9 %
18	-51,920	Total:	759,227	53.1	10.5	34.6	44.4	2.5	2014	167,824	470,333	22.3 %	35.7 %	424,549	22.3 %	39.5 %
	-6.40%	VAP:	558,055	57.7	9.8	30.4	39.9	2.4	2012	274,002	445,073	21.8 %	61.6 %	393,618	21.6 %	69.6 %
19	-44,003	Total:	767,144	52.4	11.3	32.7	43.3	4.3	2014	156,636	426,932	18.4 %	36.7 %	365,688	18.5 %	42.8 %
	-5.42%	VAP:	576,022	57.3	10.3	28.4	38.3	4.4	2012	243,874	393,847	17.6 %	61.9 %	333,403	17.4 %	73.1 %
20	115,454	Total:	926,601	16.7	2.0	80.3	81.9	1.4	2014	120,403	451,799	71.8 %	26.6 %	405,048	72.7 %	29.7 %
	14.23%	VAP:	638,985	19.7	2.1	77.0	78.9	1.5	2012	210,525	430,950	70.8 %	48.9 %	367,464	71.9 %	57.3 %

For technical reasons, election results in Texas Legislative Council reports may vary slightly from the official election results. Complete official results for all elections are maintained by the Office of the Texas Secretary of State.

with Voter Registration Comparison

SENATE DISTRICTS - PLANS173

District	Deviation		Population Total	%A	%B	%H	%BH	%O	General Election	Turnout	Total Voter Registration Total	SSVR	TO/VR	Non-Suspense Voter Registration Total	SSVR	TO/VR
21	63,402	Total:	874,549	17.1	6.4	75.6	81.3	1.6	2014	117,856	452,444	64.2 %	26.0 %	403,651	65.4 %	29.2 %
	7.82%	VAP:	599,223	20.0	6.4	72.3	78.2	1.8	2012	212,398	414,568	64.1 %	51.2 %	364,111	65.1 %	58.3 %
22	-72,059	Total:	739,088	72.6	8.5	17.2	25.5	1.9	2014	162,343	443,377	8.1 %	36.6 %	393,352	8.0 %	41.3 %
	-8.88%	VAP:	554,640	75.8	8.2	14.2	22.3	1.9	2012	263,566	422,333	7.5 %	62.4 %	371,193	7.4 %	71.0 %
23	99,697	Total:	910,844	16.1	37.9	44.4	81.5	2.4	2014	139,235	456,667	20.9 %	30.5 %	404,335	21.8 %	34.4 %
	12.29%	VAP:	642,214	20.2	38.3	39.4	77.2	2.6	2012	257,991	429,435	20.0 %	60.1 %	375,414	20.8 %	68.7 %
24	-103,834	Total:	707,313	67.8	9.5	20.7	29.6	2.6	2014	148,271	411,945	11.4 %	36.0 %	352,336	11.3 %	42.1 %
	-12.80%	VAP:	536,656	72.2	8.4	17.2	25.2	2.6	2012	244,857	399,389	10.8 %	61.3 %	338,963	10.6 %	72.2 %
25	-99,947	Total:	711,200	58.3	5.1	33.0	37.5	4.2	2014	198,774	493,233	21.9 %	40.3 %	424,503	22.0 %	46.8 %
	-12.32%	VAP:	534,870	62.0	4.6	29.7	33.9	4.1	2012	306,826	452,315	20.9 %	67.8 %	381,510	20.6 %	80.4 %
26	-8,989	Total:	802,158	21.2	8.1	68.4	75.5	3.3	2014	116,556	413,475	55.6 %	28.2 %	353,297	57.1 %	33.0 %
	-1.11%	VAP:	589,629	24.8	7.6	64.8	71.7	3.5	2012	207,989	388,344	55.3 %	53.6 %	320,973	56.6 %	64.8 %
27	152,522	Total:	963,669	15.2	1.4	82.4	83.4	1.4	2014	117,670	455,215	72.4 %	25.8 %	401,879	73.5 %	29.3 %
	18.80%	VAP:	656,632	18.9	1.3	78.5	79.6	1.6	2012	204,557	424,763	71.0 %	48.2 %	361,128	72.3 %	56.6 %
28	-72,782	Total:	738,365	57.3	6.2	34.9	40.5	2.1	2014	131,040	421,136	25.5 %	31.1 %	364,486	25.5 %	36.0 %
	-8.97%	VAP:	558,078	61.8	5.7	30.5	36.0	2.2	2012	240,944	410,331	24.9 %	58.7 %	349,318	24.6 %	69.0 %
29	97,638	Total:	908,785	14.5	3.5	81.1	83.8	1.7	2014	99,159	466,724	68.8 %	21.2 %	404,361	70.7 %	24.5 %
	12.04%	VAP:	638,913	16.9	3.3	78.4	81.2	1.9	2012	202,763	415,480	68.6 %	48.8 %	352,955	70.4 %	57.4 %
30	-79,423	Total:	731,724	75.5	6.8	14.8	21.3	3.2	2014	130,291	434,722	6.6 %	30.0 %	383,736	6.6 %	34.0 %
	-9.79%	VAP:	557,300	78.5	6.3	12.2	18.3	3.2	2012	251,039	415,952	6.0 %	60.4 %	353,934	5.8 %	70.9 %
31	-17,547	Total:	793,600	54.8	5.4	37.6	42.6	2.7	2014	127,897	422,545	24.0 %	30.3 %	373,262	24.2 %	34.3 %
	-2.16%	VAP:	573,847	59.9	4.9	32.8	37.5	2.7	2012	237,139	404,586	22.7 %	58.6 %	351,115	22.6 %	67.5 %

District Population Analysis with County Subtotals

SENATE DISTRICTS - PLANS174

Total State Population	25,145,561
Total Districts Required	31
Ideal District Population	811,147
Unassigned Population	0
Districts in Plan	31
Unassigned Geography	No
Districts Contiguous	Yes

	Population	--------Deviation--------	
		Total	Percent
Plan Overall Range		470,789	58.04%
Smallest District (25)	628,257	-182,890	-22.55%
Largest District (6)	1,099,046	287,899	35.49%
Average (mean)	811,147	72,981	9.00%

PLANS174

SENATE DISTRICTS - PLANS174

	2010 Census			2009-2013 ACS Special Tabulation				2014 General Election				
								Total Voter Registration		Non-Suspense Voter Registration		
District	Total	VAP	% HVAP	Citizen VAP	MOE	% HCVAP	MOE	Total	%SSVR	Total	%SSVR	%SSTO
1	742,850	557,581	10.5	527,395	(±5,551)	5.9	(±0.3%)	451,115	4.3	399,415	4.3	1.8
2	833,730	592,848	23.2	535,230	(±5,962)	14.6	(±0.5%)	462,169	11.5	413,006	11.7	6.6
3	750,167	570,303	10.6	543,240	(±6,006)	6.8	(±0.3%)	446,347	4.9	401,505	4.9	2.4
4	735,435	541,793	16.3	501,295	(±6,242)	10.5	(±0.4%)	446,913	8.1	395,273	8.2	4.5
5	712,791	525,856	17.8	507,570	(±5,891)	14.9	(±0.5%)	459,641	10.9	403,118	10.8	6.8
6	1,099,046	763,138	57.6	578,610	(±6,868)	45.6	(±0.7%)	457,993	40.6	411,977	41.6	27.6
7	765,276	547,285	21.5	495,325	(±6,058)	16.8	(±0.6%)	456,771	13.4	411,826	13.5	8.4
8	760,269	548,346	13.9	489,695	(±5,418)	9.5	(±0.4%)	461,999	6.9	409,600	6.8	4.8
9	865,616	616,452	25.1	536,815	(±6,105)	16.3	(±0.6%)	455,528	12.9	387,409	13.1	8.1
10	820,292	593,518	25.2	525,660	(±5,669)	17.1	(±0.5%)	456,059	13.9	398,862	14.2	8.4
11	706,045	516,005	20.9	487,725	(±5,809)	17.8	(±0.6%)	446,627	14.6	397,110	14.7	8.6
12	757,948	544,393	17.0	505,095	(±5,785)	12.1	(±0.5%)	460,306	9.7	396,759	9.8	6.2
13	898,478	663,359	32.3	494,085	(±6,332)	17.6	(±0.6%)	446,870	13.7	389,112	14.2	8.5
14	694,647	539,158	26.7	476,175	(±5,605)	19.3	(±0.6%)	451,426	14.4	372,937	14.5	10.8
15	873,142	623,663	36.1	523,310	(±6,266)	24.5	(±0.7%)	446,669	19.7	399,881	20.0	11.7
16	816,670	614,614	25.8	496,940	(±5,901)	14.8	(±0.5%)	447,405	11.0	387,527	11.0	6.7
17	747,638	557,556	21.2	475,095	(±6,046)	16.9	(±0.6%)	447,057	13.0	394,993	13.0	8.5
18	736,476	537,161	30.4	497,460	(±5,937)	23.6	(±0.7%)	444,926	21.7	401,937	21.7	11.8
19	812,983	607,112	31.8	549,635	(±6,460)	25.9	(±0.6%)	458,021	21.7	392,534	22.0	14.8
20	926,601	638,985	77.0	530,075	(±6,692)	73.7	(±0.7%)	451,799	71.8	405,048	72.7	61.8
21	852,956	582,492	73.7	505,970	(±6,338)	69.8	(±0.7%)	448,637	64.6	400,698	65.7	55.0
22	784,574	580,639	16.8	547,545	(±5,627)	12.1	(±0.4%)	456,882	10.1	400,543	10.1	4.9
23	910,844	642,214	39.4	520,420	(±6,097)	26.0	(±0.6%)	456,667	20.9	404,335	21.8	11.5
24	760,096	567,157	15.4	551,850	(±6,087)	13.3	(±0.5%)	453,261	9.9	385,166	9.7	4.7
25	628,257	473,325	27.8	465,725	(±5,516)	26.5	(±0.7%)	444,421	20.4	384,770	20.4	15.2
26	878,922	646,552	62.9	582,665	(±6,623)	60.6	(±0.7%)	450,504	54.3	384,385	55.9	46.8
27	963,669	656,632	78.5	530,430	(±6,849)	74.5	(±0.7%)	455,215	72.4	401,879	73.5	61.3
28	806,475	611,050	27.6	585,815	(±5,957)	25.7	(±0.5%)	460,587	22.6	395,368	22.6	9.8
29	888,467	624,642	78.3	514,930	(±6,104)	74.0	(±0.7%)	456,555	68.8	395,673	70.7	58.9
30	758,205	575,685	52.3	547,770	(±5,446)	8.8	(±0.3%)	450,556	6.6	397,573	6.6	3.4
31	856,996	620,223	33.6	566,670	(±5,489)	29.1	(±0.6%)	458,965	25.3	405,392	25.4	10.0

American Community Survey provided estimated citizen voting age population (CVAP) data at the block group level in a Special Tabulation. All block groups with more than 50% of the population in a district are included in the analysis.
E = Margin of error at 90% confidence level
VAP = Hispanic voting age population / voting age population
CVAP = Hispanic citizen voting age population / citizen voting age population
R = Spanish surname voter registration (SSVR/VR)
O = Spanish surname turnout (SSTO/TO) data, starting with 2012, obtained from the Office of the Texas Secretary of State.

40357

SENATE DISTRICTS - PLAN S172

District	Deviation		Population Total	%A	%B	%H	%BH	%O	General Election	Turnout	Total Voter Registration Total	SSVR	TO/VR	Non-Suspense Voter Registration Total	SSVR	TO/VR
1	-68,297	Total:	742,850	66.6	18.2	13.3	31.2	2.1	2014	165,816	451,115	4.3 %	36.8 %	399,415	4.3 %	41.5 %
	-8.42%	VAP:	557,581	70.4	17.2	10.5	27.5	2.0	2012	277,823	429,821	3.8 %	64.6 %	378,811	3.8 %	73.3 %
2	22,583	Total:	833,730	56.5	13.1	27.3	39.9	3.6	2014	161,948	462,169	11.5 %	35.0 %	413,006	11.7 %	39.2 %
	2.78%	VAP:	592,848	61.6	11.9	23.2	34.7	3.6	2012	272,987	427,124	10.5 %	63.9 %	375,034	10.6 %	72.8 %
3	-60,980	Total:	750,167	71.0	14.5	12.9	27.2	1.8	2014	156,741	446,347	4.9 %	35.1 %	401,505	4.9 %	39.0 %
	-7.52%	VAP:	570,303	73.8	14.0	10.6	24.5	1.7	2012	268,251	431,536	4.5 %	62.2 %	383,183	4.4 %	70.0 %
4	-75,712	Total:	735,435	62.0	15.7	19.1	34.4	3.6	2014	162,606	446,913	8.1 %	36.4 %	395,273	8.2 %	41.1 %
	-9.33%	VAP:	541,793	65.2	15.3	16.5	31.3	3.5	2012	269,896	419,135	7.4 %	64.4 %	366,822	7.4 %	73.6 %
5	-98,356	Total:	712,791	66.6	8.2	20.3	28.5	4.8	2014	183,696	459,641	10.9 %	40.0 %	403,118	10.8 %	45.6 %
	-12.13%	VAP:	525,856	70.2	7.7	17.8	25.3	4.5	2012	283,290	419,402	10.3 %	67.5 %	361,710	10.0 %	78.3 %
6	287,899	Total:	1,099,046	23.8	10.9	62.2	72.3	3.9	2014	125,382	457,993	40.6 %	27.4 %	411,977	41.6 %	30.4 %
	35.49%	VAP:	763,138	28.0	10.7	57.6	67.8	4.2	2012	238,114	439,129	39.4 %	54.2 %	381,401	40.4 %	62.4 %
7	-45,871	Total:	765,276	55.1	12.0	24.2	35.6	9.3	2014	169,583	456,771	13.4 %	37.1 %	411,826	13.5 %	41.2 %
	-5.66%	VAP:	547,285	58.8	11.0	21.5	32.0	9.2	2012	289,107	420,192	12.5 %	68.8 %	370,297	12.3 %	78.1 %
8	-50,878	Total:	760,269	58.8	10.9	15.8	26.3	14.9	2014	168,883	461,999	6.9 %	36.6 %	409,600	6.8 %	41.2 %
	-6.27%	VAP:	548,346	61.9	10.1	13.9	23.7	14.4	2012	290,173	423,070	6.3 %	68.6 %	360,870	6.1 %	80.4 %
9	54,469	Total:	865,616	50.1	13.5	28.9	41.8	8.1	2014	159,386	455,528	12.9 %	35.0 %	387,409	13.1 %	41.1 %
	6.72%	VAP:	616,452	54.8	12.5	25.1	37.2	8.1	2012	271,561	417,231	12.3 %	65.1 %	350,023	12.2 %	77.6 %
10	9,145	Total:	820,292	46.9	19.5	29.3	48.2	4.9	2014	178,864	456,059	13.9 %	39.2 %	398,862	14.2 %	44.8 %
	1.13%	VAP:	593,518	52.2	18.2	25.2	42.9	4.9	2012	285,255	413,324	13.5 %	69.0 %	353,753	13.6 %	80.6 %
11	-105,102	Total:	706,045	54.4	13.8	23.7	37.1	8.5	2014	155,100	446,627	14.6 %	34.7 %	397,110	14.7 %	39.1 %
	-12.96%	VAP:	516,005	58.0	13.2	20.9	33.8	8.2	2012	260,553	418,116	14.1 %	62.3 %	359,754	14.0 %	72.4 %
12	-53,199	Total:	757,948	64.0	8.9	19.7	28.3	7.7	2014	162,510	460,306	9.7 %	35.3 %	396,759	9.8 %	41.0 %
	-6.56%	VAP:	544,393	67.5	8.3	17.0	25.0	7.5	2012	277,400	415,570	9.1 %	66.8 %	357,631	9.0 %	77.6 %
13	87,331	Total:	898,478	15.7	40.5	36.1	75.6	8.7	2014	142,696	446,870	13.7 %	31.9 %	389,112	14.2 %	36.7 %
	10.77%	VAP:	663,359	18.5	40.4	32.3	71.9	9.6	2012	257,916	426,303	13.0 %	60.5 %	358,337	13.2 %	72.0 %
14	-116,500	Total:	694,647	51.2	10.4	30.8	40.5	8.3	2014	187,224	451,426	14.4 %	41.5 %	372,937	14.5 %	50.2 %
	-14.36%	VAP:	539,158	55.9	9.5	26.7	35.8	8.3	2012	268,450	415,341	13.8 %	64.6 %	335,191	13.7 %	80.1 %
15	61,995	Total:	873,142	32.4	23.0	40.3	62.4	5.2	2014	147,930	446,669	19.7 %	33.1 %	399,881	20.0 %	37.0 %
	7.64%	VAP:	623,663	36.9	22.1	36.1	57.7	5.5	2012	261,545	417,004	18.7 %	62.7 %	361,640	18.8 %	72.3 %
16	5,523	Total:	816,670	48.3	11.8	30.0	41.3	10.4	2014	170,569	447,405	11.0 %	38.1 %	387,527	11.0 %	44.0 %
	0.68%	VAP:	614,614	53.0	11.1	25.8	36.6	10.4	2012	281,985	420,581	10.2 %	67.0 %	359,919	10.1 %	78.3 %
17	-63,509	Total:	747,638	45.4	15.3	23.2	37.9	16.7	2014	167,463	447,037	13.0 %	37.5 %	394,993	13.0 %	42.4 %
	-7.83%	VAP:	557,556	48.7	14.0	21.2	34.8	16.6	2012	277,090	411,561	12.7 %	67.3 %	356,031	12.5 %	77.8 %
18	-74,671	Total:	736,476	50.8	11.8	34.6	45.7	3.5	2014	155,878	444,926	21.7 %	35.0 %	401,937	21.7 %	38.8 %
	-9.21%	VAP:	537,161	55.6	11.0	30.4	41.1	3.4	2012	257,364	419,690	21.2 %	61.3 %	370,729	21.0 %	69.4 %
19	1,836	Total:	812,983	50.8	9.4	36.3	45.0	4.2	2014	168,058	458,021	21.7 %	36.7 %	392,534	22.0 %	42.8 %
	0.23%	VAP:	607,112	55.6	8.6	31.8	40.0	4.4	2012	260,190	418,273	20.9 %	62.2 %	353,315	20.9 %	73.6 %
20	115,454	Total:	926,601	16.7	2.0	80.3	81.9	1.4	2014	120,403	451,799	71.8 %	26.6 %	405,048	72.7 %	29.7 %
	14.23%	VAP:	638,985	19.7	2.1	77.0	78.9	1.5	2012	210,525	430,950	70.8 %	48.9 %	367,464	71.9 %	57.3 %

For technical reasons, election results in Texas Legislative Council reports may vary slightly from the official election results. Complete official results for all elections are maintained by the Office of the Texas Secretary of State.
SSVR = Spanish surname voter registration

SENATE DISTRICTS - PLANS174

District	Deviation		Population Total	%A	%B	%H	%BH	%O	General Election	Turnout	Total Voter Registration Total	SSVR	TO/VR	Non-Suspense Voter Registration Total	SSVR	TO/VR
21	41,809	Total:	852,956	16.7	5.6	76.7	81.6	1.7	2014	117,534	448,637	64.6 %	26.2 %	400,698	65.7 %	29.3 %
	5.15%	VAP:	582,492	19.4	5.5	73.7	78.8	1.8	2012	210,504	410,878	64.6 %	51.2 %	361,130	65.6 %	58.3 %
22	-26,573	Total:	784,574	67.4	10.6	20.3	30.6	2.1	2014	161,114	456,882	10.1 %	35.3 %	400,543	10.1 %	40.2 %
	-3.28%	VAP:	580,639	71.5	9.8	16.8	26.5	2.0	2012	264,950	437,134	9.4 %	60.6 %	383,549	9.3 %	69.1 %
23	99,697	Total:	910,844	16.1	37.9	44.4	81.5	2.4	2014	139,235	456,667	20.9 %	30.5 %	404,335	21.8 %	34.4 %
	12.29%	VAP:	642,214	20.2	38.3	39.4	77.2	2.6	2012	257,991	429,435	20.0 %	60.1 %	375,414	20.8 %	68.7 %
24	-51,051	Total:	760,096	66.4	12.5	18.3	29.9	3.7	2014	154,726	453,261	9.9 %	34.1 %	385,166	9.7 %	40.2 %
	-6.29%	VAP:	567,157	70.8	10.8	15.4	25.6	3.6	2012	261,759	431,920	9.5 %	60.6 %	359,959	9.2 %	72.7 %
25	-182,890	Total:	628,257	60.6	4.9	30.9	35.3	4.1	2014	184,152	444,421	20.4 %	41.4 %	384,770	20.4 %	47.9 %
	-22.55%	VAP:	473,325	64.2	4.5	27.8	31.9	3.9	2012	281,696	409,190	19.4 %	68.8 %	347,091	19.1 %	81.2 %
26	67,775	Total:	878,922	22.2	8.6	66.8	74.3	3.4	2014	126,942	450,504	54.3 %	28.2 %	384,385	55.9 %	33.0 %
	8.36%	VAP:	646,552	25.9	8.1	62.9	70.4	3.7	2012	227,543	422,211	54.0 %	53.9 %	348,699	55.3 %	65.3 %
27	152,522	Total:	963,669	15.2	1.4	82.4	83.4	1.4	2014	117,670	455,215	72.4 %	25.8 %	401,879	73.5 %	29.3 %
	18.80%	VAP:	656,632	18.9	1.3	78.5	79.6	1.6	2012	204,557	424,763	71.0 %	48.2 %	361,128	72.3 %	56.6 %
28	-4,672	Total:	806,475	59.8	6.7	31.7	37.8	2.4	2014	144,656	460,587	22.6 %	31.4 %	395,368	22.6 %	36.6 %
	-0.58%	VAP:	611,050	64.3	6.0	27.6	33.3	2.4	2012	266,304	447,310	21.9 %	59.5 %	377,922	21.7 %	70.5 %
29	77,320	Total:	888,467	14.5	3.6	81.0	83.8	1.7	2014	96,975	456,555	68.8 %	21.2 %	395,673	70.7 %	24.5 %
	9.53%	VAP:	624,642	17.0	3.3	78.3	81.2	1.9	2012	198,485	404,959	68.6 %	49.0 %	344,753	70.3 %	57.6 %
30	-52,942	Total:	758,205	75.4	6.7	15.0	21.4	3.2	2014	136,005	450,556	6.6 %	30.2 %	397,573	6.6 %	34.2 %
	-6.53%	VAP:	575,685	78.5	6.2	12.3	18.4	3.2	2012	260,211	430,134	6.0 %	60.5 %	366,228	5.8 %	71.1 %
31	45,849	Total:	856,996	54.1	5.4	38.4	43.4	2.5	2014	138,060	458,965	25.3 %	30.1 %	405,392	25.4 %	34.1 %
	5.65%	VAP:	620,223	59.2	5.0	33.6	38.3	2.5	2012	255,745	440,759	24.1 %	58.0 %	382,684	23.8 %	66.8 %

al reasons, election results in Texas Legislative Council reports may vary slightly from the official election results. Complete official results for all elections are maintained by the Office of the Texas Secretary of State.
anish surname voter registration

District Population Analysis with County Subtotals

HOUSE DISTRICTS - PLANH358

Total State Population	25,145,561
Total Districts Required	150
Ideal District Population	167,637
Unassigned Population	0
Districts in Plan	150
Unassigned Geography	No
Districts Contiguous	Yes

	Population	Deviation	
		Total	Percent
Plan Overall Range		16,513	9.85%
Smallest District (142)	159,541	-8,096	-4.83%
Largest District (61)	176,054	8,417	5.02%
Average (mean)	167,637	4,308	2.57%

PLANH358

HOUSE DISTRICTS - PLANH358

	2010 Census			2009-2013 ACS Special Tabulation				2014 General Election				
								Total Voter Registration		Non-Suspense Voter Registration		
District	Total	VAP	% HVAP	Citizen VAP	MOE	% HCVAP	MOE	Total	%SSVR	Total	%SSVR	%SSTO
1	165,823	125,927	58	122,470	(±2,705)	4.0	(±0.5%)	101,586	2.1	89,123	2.0	1.1
2	173,869	130,806	10.0	124,825	(±2,634)	6.3	(±0.6%)	105,125	4.8	93,391	4.7	2.4
3	164,955	119,595	20.0	109,760	(±3,444)	12.1	(±1.2%)	102,268	9.8	90,124	10.0	5.0
4	168,429	123,603	11.7	117,715	(±2,818)	7.3	(±0.7%)	102,429	6.6	90,273	6.7	3.5
5	160,253	120,169	13.2	112,555	(±2,513)	7.0	(±0.7%)	98,294	5.6	87,954	5.6	2.1
6	160,008	119,154	14.9	109,970	(±2,538)	8.7	(±0.9%)	94,586	6.3	83,982	6.4	2.7
7	161,039	120,296	11.2	112,255	(±2,507)	5.5	(±0.6%)	94,323	4.3	82,539	4.3	1.8
8	161,098	123,550	15.4	114,450	(±2,495)	9.5	(±0.7%)	87,834	7.3	77,894	7.3	3.4
9	166,719	125,947	6.9	121,420	(±2,713)	3.5	(±0.5%)	106,959	2.7	96,229	2.6	1.2
10	163,063	116,978	18.7	111,680	(±2,473)	14.0	(±1.1%)	101,519	12.1	90,080	12.2	6.0
11	168,699	128,086	13.9	118,640	(±2,557)	7.5	(±0.6%)	88,287	5.5	78,878	5.5	2.2
12	160,573	119,556	19.5	111,590	(±2,665)	13.8	(±1.1%)	90,492	11.4	79,556	11.4	5.4
13	170,617	131,129	15.9	123,515	(±2,668)	11.3	(±0.9%)	109,558	9.4	100,162	9.2	4.3
14	163,187	131,479	21.0	114,485	(±3,221)	16.5	(±1.0%)	72,206	13.5	57,687	13.8	8.6
15	167,349	120,450	13.5	116,690	(±3,258)	9.9	(±0.9%)	114,917	7.7	99,362	7.7	5.2
16	166,647	122,271	21.1	108,180	(±3,231)	11.0	(±1.1%)	94,548	9.4	83,517	9.6	4.4
17	163,480	121,295	33.4	112,125	(±2,794)	28.2	(±1.3%)	93,583	23.6	83,432	23.6	12.9
18	169,888	132,877	14.2	126,560	(±3,430)	10.3	(±0.7%)	89,160	7.1	77,746	7.1	3.2
19	171,969	131,682	6.3	128,705	(±2,845)	4.4	(±0.5%)	117,707	3.0	105,957	3.0	1.9
20	159,816	121,754	16.6	115,395	(±2,504)	12.1	(±1.0%)	108,834	9.0	97,886	8.8	4.3
21	172,180	130,308	9.3	121,365	(±2,639)	7.6	(±0.7%)	107,054	6.4	98,120	6.4	4.4
22	161,930	122,897	15.7	115,525	(±2,666)	9.5	(±0.8%)	89,504	6.2	78,668	6.3	3.4
23	163,720	123,736	22.7	111,960	(±2,649)	17.4	(±1.1%)	105,521	15.2	91,725	15.4	9.2
24	162,685	118,491	15.6	118,260	(±2,930)	13.9	(±1.2%)	111,969	11.0	98,625	11.1	7.2
25	174,168	129,041	27.4	121,250	(±2,832)	23.4	(±1.3%)	97,765	19.3	87,629	19.2	9.0
26	160,091	117,247	14.9	97,320	(±2,690)	14.5	(±1.3%)	100,095	11.1	90,199	11.2	8.1
27	160,084	113,596	19.7	104,295	(±2,865)	15.5	(±1.2%)	99,749	12.0	89,392	12.2	7.1
28	160,373	107,968	20.6	100,995	(±3,011)	15.3	(±1.3%)	106,577	12.9	95,223	13.0	8.9
29	175,700	124,171	23.2	116,165	(±2,991)	20.0	(±1.5%)	106,897	16.5	96,728	16.6	9.3
30	166,022	124,729	35.2	121,220	(±2,579)	33.7	(±1.3%)	102,911	30.3	93,137	30.2	17.3
31	171,858	121,699	77.7	104,285	(±2,886)	75.1	(±1.5%)	97,289	75.8	89,753	76.4	63.4
32	167,074	126,072	45.9	124,080	(±2,920)	46.1	(±1.5%)	96,370	39.0	82,417	39.9	30.5
33	172,135	119,518	13.5	115,655	(±2,731)	9.9	(±0.9%)	110,788	7.7	99,203	7.7	4.8
34	173,149	125,896	67.7	117,465	(±3,003)	67.4	(±1.6%)	93,936	62.1	83,365	63.1	50.5
35	168,627	109,154	85.1	77,585	(±2,538)	80.1	(±1.7%)	66,390	78.4	57,061	78.8	70.4
36	168,963	110,963	90.8	76,060	(±2,839)	87.1	(±1.5%)	72,982	86.2	66,865	87.3	81.9

American Community Survey provided estimated citizen voting age population (CVAP) data at the block group level in a Special Tabulation. All block groups with more than 50% of the population in a district are included in the analysis.
E = Margin of error at 90% confidence level
VAP = Hispanic voting age population / voting age population
CVAP = Hispanic citizen voting age population / citizen voting age population
R = Spanish surname voter registration (SSVR/VR)
O = Spanish surname turnout (SSTO/TO) data, starting with 2012, obtained from the Office of the Texas Secretary of State

HOUSE DISTRICTS - PLANH358

	2010 Census			2009-2013 ACS Special Tabulation				2014 General Election				
								Total Voter Registration		Non-Suspense Voter Registration		
District	Total	VAP	% HVAP	Citizen VAP	MOE	% HCVAP	MOE	Total	%SSVR	Total	%SSVR	%SSTO
37	169,088	113,454	87.1	78,885	(±2,323)	83.7	(±1.3%)	76,755	80.8	68,921	81.8	68.3
38	168,214	110,865	86.7	92,195	(±2,979)	84.7	(±1.5%)	77,414	80.7	70,012	81.6	71.1
39	168,659	110,751	88.0	85,015	(±2,934)	84.7	(±1.5%)	76,621	85.0	66,661	85.7	79.3
40	168,662	108,086	92.1	79,875	(±3,099)	89.3	(±1.6%)	62,576	88.1	54,358	88.5	85.4
41	168,776	115,033	80.4	88,365	(±2,968)	79.0	(±1.7%)	74,153	72.1	66,879	73.2	63.3
42	167,668	111,699	95.0	84,125	(±2,400)	93.6	(±0.9%)	83,124	88.2	76,796	88.6	86.7
43	169,564	124,492	59.8	120,575	(±2,893)	59.2	(±1.5%)	98,198	58.4	87,099	59.4	47.0
44	174,451	126,713	32.7	125,720	(±2,673)	30.9	(±1.4%)	113,137	25.6	101,899	25.7	16.9
45	167,604	126,549	30.0	124,330	(±3,187)	27.5	(±1.4%)	114,020	21.5	95,292	21.7	14.0
46	166,410	118,539	41.6	94,335	(±2,518)	27.2	(±1.5%)	85,709	19.4	72,603	19.8	14.3
47	175,314	127,689	12.6	125,095	(±2,576)	12.3	(±0.9%)	133,922	8.6	117,555	8.6	7.9
48	173,008	135,585	20.4	127,810	(±2,462)	17.5	(±1.0%)	124,964	14.0	105,756	14.1	11.4
49	167,309	144,371	21.6	130,085	(±3,439)	15.5	(±0.9%)	124,020	11.9	97,470	11.8	9.5
50	166,516	124,252	25.3	110,735	(±2,788)	19.8	(±1.3%)	102,584	15.0	86,194	15.3	12.0
51	175,709	128,793	56.2	98,320	(±2,727)	42.6	(±1.7%)	86,640	36.7	70,163	38.4	26.9
52	165,994	114,146	26.7	111,445	(±2,924)	23.2	(±1.4%)	97,770	17.1	84,391	17.3	11.6
53	162,897	127,381	26.8	123,515	(±2,792)	24.8	(±1.2%)	108,464	20.7	97,528	20.7	10.9
54	167,736	117,164	17.6	112,385	(±3,320)	17.8	(±1.5%)	95,447	12.2	76,221	12.2	7.3
55	162,176	119,755	19.4	116,635	(±2,783)	16.0	(±1.0%)	86,613	12.9	71,135	12.9	6.7
56	163,869	123,411	17.8	117,985	(±2,622)	14.2	(±1.0%)	93,849	11.6	79,157	11.5	6.0
57	164,418	124,630	13.0	118,140	(±2,852)	9.2	(±0.9%)	97,895	6.7	87,950	6.7	3.0
58	169,146	123,826	14.9	118,105	(±2,666)	11.3	(±0.9%)	95,902	8.9	86,152	8.9	4.4
59	163,609	122,193	15.6	118,030	(±2,640)	13.1	(±0.9%)	87,814	9.9	74,924	9.8	4.1
60	171,429	131,870	11.8	127,825	(±2,616)	9.5	(±0.7%)	109,194	7.8	96,339	7.7	3.2
61	176,054	130,782	10.6	128,065	(±2,722)	7.7	(±0.7%)	114,820	5.5	102,090	5.4	2.8
62	160,023	122,203	8.6	117,530	(±2,410)	5.7	(±0.6%)	98,156	4.0	86,323	3.9	2.0
63	167,337	115,634	13.1	113,605	(±2,348)	9.8	(±0.8%)	110,659	6.9	96,890	7.0	4.6
64	167,588	129,175	16.6	116,875	(±2,745)	11.5	(±0.9%)	99,594	9.4	84,038	9.2	5.7
65	165,742	124,977	18.6	109,350	(±2,600)	12.6	(±1.0%)	93,560	9.5	78,065	9.6	6.4
66	172,129	130,796	9.1	113,390	(±2,427)	7.2	(±0.7%)	104,048	4.9	90,839	4.7	3.6
67	172,141	126,368	13.9	111,250	(±2,433)	8.9	(±0.8%)	105,139	6.7	93,727	6.6	4.9
68	160,508	121,547	18.5	112,760	(±2,116)	13.6	(±0.7%)	97,854	12.1	88,443	11.8	4.4
69	160,087	123,063	12.9	117,450	(±2,316)	11.1	(±0.7%)	92,149	8.9	84,151	8.9	4.2
70	172,135	117,432	15.9	110,995	(±2,630)	11.0	(±1.0%)	111,874	8.0	99,163	8.1	4.8
71	166,924	127,097	20.1	123,650	(±3,017)	19.0	(±0.9%)	94,313	15.4	79,459	15.4	6.6
72	170,479	130,771	32.3	123,075	(±2,618)	29.0	(±1.3%)	93,606	24.8	81,204	24.9	11.2

American Community Survey provided estimated citizen voting age population (CVAP) data at the block group level in a Special Tabulation. All block groups with more than 50% of the population in a district are included in the analysis.
E = Margin of error at 90% confidence level
VAP = Hispanic voting age population / voting age population
CVAP = Hispanic citizen voting age population / citizen voting age population
R = Spanish surname voter registration (SSVR/VR)
O = Spanish surname turnout (SSTO/TO) data, starting with 2012, obtained from the Office of the Texas Secretary of State.

39415

HOUSE DISTRICTS - PLANH358

	2010 Census			2009-2013 ACS Special Tabulation				2014 General Election				
								Total Voter Registration		Non-Suspense Voter Registration		
District	Total	VAP	% HVAP	Citizen VAP	MOE	% HCVAP	MOE	Total	%SSVR	Total	%SSVR	%SSTO
73	166,719	127,882	19.8	126,130	(±2,865)	17.2	(±1.1%)	127,187	13.7	114,743	13.6	7.6
74	162,357	115,236	76.6	91,345	(±2,485)	71.7	(±1.5%)	90,820	68.4	79,273	69.9	56.1
75	159,691	103,209	91.8	77,455	(±2,689)	88.4	(±1.4%)	72,424	82.3	65,238	83.4	77.2
76	159,752	116,389	87.3	94,705	(±2,507)	84.6	(±1.1%)	84,457	82.4	74,194	84.2	80.4
77	160,385	115,924	76.0	90,830	(±2,529)	70.2	(±1.6%)	78,608	64.3	65,627	66.2	55.2
78	160,161	111,913	64.7	98,925	(±2,476)	59.4	(±1.5%)	89,131	52.7	75,627	54.8	43.0
79	160,658	112,399	79.9	98,435	(±2,776)	77.8	(±1.5%)	80,059	71.4	69,504	73.3	65.1
80	161,949	106,402	86.1	86,650	(±2,847)	83.3	(±1.4%)	82,667	80.5	75,891	81.1	70.1
81	169,684	120,535	46.9	108,980	(±2,590)	42.3	(±1.4%)	87,081	39.1	77,449	39.9	17.6
82	163,234	118,623	35.2	113,415	(±2,760)	32.3	(±1.5%)	90,593	27.1	79,191	27.6	12.5
83	173,918	127,906	28.1	123,330	(±2,602)	26.5	(±1.2%)	102,456	23.7	89,823	23.5	10.1
84	167,970	128,898	30.2	124,075	(±3,073)	29.7	(±1.4%)	88,113	26.9	71,043	27.4	13.4
85	160,182	113,433	35.1	102,620	(±2,716)	28.7	(±1.6%)	91,227	25.5	82,089	25.4	13.8
86	165,183	121,555	22.3	115,915	(±2,397)	19.7	(±1.1%)	100,359	15.7	89,313	15.5	7.5
87	174,343	125,360	29.7	109,320	(±2,225)	23.7	(±1.2%)	81,341	20.1	70,768	20.1	7.5
88	160,896	115,622	38.9	103,670	(±2,034)	33.3	(±1.2%)	89,645	30.5	79,621	30.3	9.5
89	172,138	118,380	13.0	116,895	(±2,992)	9.3	(±0.8%)	106,333	7.7	96,842	7.7	5.2
90	159,684	105,664	70.7	71,770	(±2,274)	52.1	(±1.8%)	52,293	50.0	46,646	51.7	37.6
91	162,838	119,048	18.2	108,845	(±2,647)	13.0	(±1.1%)	91,397	11.5	79,318	11.6	7.8
92	162,326	126,290	14.5	116,980	(±2,548)	11.5	(±1.0%)	94,726	9.0	78,607	8.8	6.3
93	162,161	113,584	22.8	103,455	(±3,099)	16.6	(±1.3%)	89,145	13.0	74,724	13.3	8.5
94	167,374	125,516	15.3	114,195	(±2,455)	11.4	(±0.9%)	101,096	9.0	88,014	9.0	6.0
95	161,634	115,752	24.3	96,150	(±2,408)	14.7	(±1.0%)	83,178	10.8	71,554	11.2	6.6
96	164,930	113,924	15.2	109,035	(±2,811)	11.1	(±1.0%)	99,232	10.5	86,996	10.5	6.8
97	168,869	131,311	15.7	122,870	(±2,732)	12.4	(±1.0%)	101,175	9.6	86,771	9.6	6.4
98	164,081	114,953	9.8	114,875	(±2,600)	7.5	(±0.9%)	115,482	5.7	100,583	5.6	4.4
99	170,473	125,722	20.1	116,830	(±2,877)	16.2	(±1.1%)	97,191	13.9	84,539	14.0	8.4
100	161,143	117,479	33.1	97,410	(±2,567)	20.4	(±1.3%)	80,429	15.4	70,554	16.3	10.4
101	164,664	110,209	32.5	92,990	(±2,870)	22.2	(±1.7%)	76,365	17.2	65,386	17.5	10.2
102	161,136	122,520	24.1	96,850	(±2,335)	11.7	(±1.1%)	88,036	8.2	76,195	8.2	5.1
103	170,948	121,837	64.3	71,970	(±2,118)	40.8	(±1.8%)	61,665	36.1	52,868	38.2	22.5
104	172,784	115,035	69.2	78,780	(±2,416)	54.4	(±1.9%)	62,566	51.6	56,738	53.3	35.8
105	175,728	127,590	39.2	95,900	(±2,538)	27.3	(±1.6%)	78,940	21.6	68,731	22.1	14.6
106	161,947	110,568	14.7	107,290	(±2,749)	9.9	(±1.0%)	104,888	8.7	90,849	8.8	5.4
107	171,872	123,986	28.9	108,045	(±2,691)	19.5	(±1.3%)	87,872	15.5	77,964	16.0	10.0
108	163,233	133,667	19.5	122,505	(±2,453)	12.6	(±0.9%)	110,413	9.0	91,543	9.1	5.7

The American Community Survey provided estimated citizen voting age population (CVAP) data at the block group level, in a Special Tabulation. All block groups with more than 50% of the population in a district are included in the analysis.
MOE = Margin of error at 90% confidence level
% HVAP = Hispanic voting age population / voting age population
% HCVAP = Hispanic citizen voting age population / citizen voting age population
SSVR = Spanish surname voter registration (SSVR/VR)
SSTO = Spanish surname turnout (SSTO/TO) data, starting with 2012, obtained from the Office of the Texas Secretary of State

HOUSE DISTRICTS - PLANH358

	2010 Census			2009-2013 ACS Special Tabulation				2014 General Election				
								Total Voter Registration		Non-Suspense Voter Registration		
District	Total	VAP	% HVAP	Citizen VAP	MOE	% HCVAP	MOE	Total	%SSVR	Total	%SSVR	%SSTO
109	174,223	122,347	20.0	112,780	(±2,842)	12.9	(±1.0%)	103,305	9.4	92,592	9.6	4.4
110	167,908	111,827	45.5	83,885	(±2,610)	28.6	(±1.7%)	74,790	21.3	67,835	22.3	11.8
111	166,963	118,393	25.5	103,410	(±2,784)	17.0	(±1.3%)	95,371	13.1	85,512	13.5	7.1
112	167,051	120,192	26.3	97,965	(±2,668)	17.3	(±1.4%)	87,455	12.7	78,464	12.8	7.9
113	171,418	120,834	26.0	106,040	(±2,701)	18.0	(±1.3%)	88,676	14.3	79,984	14.5	8.5
114	172,330	130,817	24.2	105,540	(±2,278)	11.4	(±0.9%)	97,318	7.9	84,264	7.7	5.2
115	171,802	127,352	24.4	100,760	(±2,378)	16.9	(±1.2%)	89,403	12.4	76,437	12.6	7.9
116	171,463	132,823	59.9	115,470	(±2,903)	58.7	(±1.6%)	86,838	51.7	70,447	53.8	47.5
117	168,692	117,126	58.8	111,045	(±3,035)	58.0	(±1.7%)	87,991	50.8	77,193	52.0	40.5
118	164,436	116,859	68.7	106,575	(±2,997)	67.4	(±1.7%)	86,366	60.4	77,035	61.4	50.3
119	159,981	114,477	62.7	106,465	(±2,745)	59.5	(±1.6%)	84,659	52.3	74,102	53.5	44.5
120	175,132	124,829	42.2	114,810	(±2,965)	37.9	(±1.6%)	91,398	31.9	77,114	32.6	24.0
121	174,867	133,224	31.4	128,905	(±2,866)	30.0	(±1.3%)	114,377	23.5	98,018	23.7	18.3
122	175,184	128,725	27.8	124,270	(±2,576)	26.7	(±1.3%)	129,193	20.8	111,743	20.8	17.3
123	175,674	135,763	66.5	119,930	(±2,981)	63.9	(±1.4%)	90,541	55.0	77,145	56.3	45.4
124	174,795	120,503	66.0	115,090	(±3,161)	63.8	(±1.7%)	90,889	56.5	78,840	58.0	49.8
125	174,549	125,158	69.1	115,800	(±2,763)	65.9	(±1.5%)	96,004	59.7	83,807	60.9	50.5
126	169,256	123,014	26.8	99,335	(±2,751)	19.8	(±1.5%)	94,636	15.7	84,886	16.0	9.3
127	163,983	115,865	18.1	114,290	(±2,879)	15.7	(±1.2%)	106,125	12.6	96,210	12.7	8.0
128	172,221	124,645	25.0	116,020	(±2,888)	19.9	(±1.3%)	94,395	18.2	85,218	18.4	10.7
129	174,127	130,457	20.4	121,280	(±2,930)	18.2	(±1.3%)	104,980	14.3	93,584	14.5	10.1
130	175,532	122,108	17.7	119,770	(±2,847)	14.9	(±1.3%)	110,015	11.7	100,843	11.8	7.4
131	175,227	121,368	41.2	93,535	(±2,983)	24.8	(±1.7%)	79,235	19.9	71,127	20.7	11.5
132	172,973	117,666	33.0	109,150	(±3,154)	26.3	(±1.8%)	96,167	20.6	86,440	21.0	12.7
133	171,401	135,423	14.7	114,530	(±2,796)	12.2	(±1.1%)	106,614	7.6	94,605	7.2	5.2
134	174,421	143,575	13.3	130,040	(±2,586)	11.4	(±0.9%)	121,376	8.0	105,558	7.7	5.9
135	172,422	121,136	28.5	99,750	(±2,933)	21.3	(±1.6%)	91,373	18.4	81,953	18.6	12.3
136	164,376	116,361	16.3	113,740	(±2,738)	15.4	(±1.1%)	107,809	11.2	91,865	11.3	8.9
137	171,079	127,834	51.5	64,375	(±2,377)	25.8	(±1.9%)	50,649	20.2	41,070	20.7	14.5
138	173,059	124,435	41.3	98,420	(±2,701)	28.0	(±1.6%)	80,595	22.0	72,343	22.0	12.7
139	175,733	123,875	35.8	100,540	(±2,776)	23.8	(±1.6%)	91,426	18.7	82,952	19.2	11.0
140	170,732	112,332	75.8	69,415	(±2,552)	62.4	(±2.2%)	56,097	57.5	51,848	58.9	45.1
141	166,498	113,951	37.6	92,390	(±2,829)	21.0	(±1.4%)	74,114	16.3	63,870	16.8	9.0
142	159,541	113,288	35.0	91,845	(±2,711)	26.2	(±1.7%)	78,482	20.1	68,835	20.8	11.3
143	167,215	113,877	69.4	84,625	(±2,678)	56.5	(±1.9%)	63,772	54.3	57,749	55.5	40.2
144	161,859	108,509	69.8	75,785	(±2,295)	59.1	(±1.8%)	55,178	55.1	49,196	56.3	41.9

Community Survey provided estimated citizen voting age population (CVAP) data at the block group level in a Special Tabulation. All block groups with more than 50% of the population in a district are included in the analysis
n of error at 90% confidence level
ispanic voting age population / voting age population
Hispanic citizen voting age population / citizen voting age population
sh surname voter registration (SSVR/VR)
sh surname turnout (SSTO/TO) data, starting with 2012, obtained from the Office of the Texas Secretary of State

Hispanic Population ...

Using Census, 2009-2013 American Community Survey, Voter Registration, and Turnout Data

HOUSE DISTRICTS - PLANH358

	2010 Census			2009-2013 ACS Special Tabulation				2014 General Election				
								Total Voter Registration		Non-Suspense Voter Registration		
District	Total	VAP	% HVAP	Citizen VAP	MOE	% HCVAP	MOE	Total	%SSVR	Total	%SSVR	%SSTO
145	164,574	116,918	69.8	83,645	(±2,505)	59.3	(±1.8%)	63,226	54.9	56,399	56.5	44.1
146	174,485	130,444	27.3	97,195	(±2,715)	13.1	(±1.1%)	86,913	10.8	74,739	11.1	7.5
147	175,873	136,034	31.2	114,905	(±2,933)	22.7	(±1.3%)	99,839	16.6	85,657	17.3	11.8
148	170,811	125,873	61.1	91,615	(±2,800)	46.8	(±2.0%)	75,432	40.0	67,109	40.9	26.9
149	170,702	121,535	33.8	89,230	(±2,957)	23.4	(±1.5%)	80,205	18.8	70,927	19.4	13.0
150	168,735	120,462	21.0	109,725	(±2,754)	15.4	(±1.2%)	105,495	13.4	95,554	13.6	8.9

...an Community Survey provided estimated citizen voting age population (CVAP) data at the block group level in a Special Tabulation. All block groups with more than 50% of the population in a district are included in the analysis.
...rgin of error at 90% confidence level
... = Hispanic voting age population / voting age population
... = Hispanic citizen voting age population / citizen voting age population
... = ... Voter Registration (SSVR/VR)

HOUSE DISTRICTS - PLANH358

District	Deviation		Population Total	%A	%B	%H	%BH	%O	General Election	Turnout	Total Voter Registration Total	SSVR	TO/VR	Non-Suspense Voter Registration Total	SSVR	TO/VR
1	1,814	Total:	165,823	70.8	20.1	6.9	26.7	2.5	2014	37,962	101,586	2.1%	37.4%	89,123	2.0%	42.6%
	1.08%	VAP:	125,927	73.6	18.4	5.8	24.0	2.4	2012	62,041	97,753	1.9%	63.5%	84,672	1.8%	73.3%
2	6,232	Total:	173,869	78.2	7.0	12.6	19.4	2.4	2014	36,180	105,125	4.8%	34.4%	93,391	4.7%	38.7%
	3.72%	VAP:	130,806	81.4	6.4	10.0	16.2	2.4	2012	60,167	100,776	4.4%	59.7%	86,993	4.2%	69.2%
3	-2,682	Total:	164,955	64.9	9.0	24.1	32.8	2.3	2014	34,694	102,268	9.8%	33.9%	90,124	10.0%	38.5%
	-1.60%	VAP:	119,595	68.3	9.7	20.0	29.4	2.3	2012	57,807	92,958	9.1%	62.2%	79,997	9.4%	72.3%
4	792	Total:	168,429	73.9	9.5	14.8	24.0	2.0	2014	35,228	102,429	6.6%	34.4%	90,273	6.7%	39.0%
	0.47%	VAP:	123,603	77.6	8.8	11.7	20.4	2.0	2012	58,601	97,466	6.0%	60.1%	83,813	6.0%	69.9%
5	-7,384	Total:	160,253	70.1	11.4	17.1	28.3	1.7	2014	38,077	98,294	5.6%	38.7%	87,954	5.6%	43.3%
	-4.40%	VAP:	120,169	74.4	11.0	13.2	24.0	1.6	2012	59,712	94,664	5.1%	63.1%	84,259	5.0%	70.9%
6	-7,629	Total:	160,008	59.4	20.0	18.5	38.1	2.5	2014	35,825	94,586	6.3%	37.9%	83,982	6.4%	42.7%
	-4.55%	VAP:	119,154	64.9	19.0	14.9	33.7	2.4	2012	60,490	88,307	5.7%	68.4%	80,116	5.8%	75.4%
7	6,598	Total:	161,039	66.0	18.2	14.1	31.9	2.1	2014	32,379	94,323	4.3%	34.3%	82,539	4.3%	39.2%
	3.94%	VAP:	120,296	70.1	16.9	11.2	27.8	2.1	2012	57,294	90,532	3.9%	63.3%	77,782	3.8%	73.7%
8	6,539	Total:	161,088	64.5	15.8	18.5	33.9	1.6	2014	33,430	87,834	7.3%	38.1%	77,894	7.3%	42.9%
	3.90%	VAP:	123,550	67.4	15.9	15.4	31.1	1.5	2012	51,497	85,240	6.8%	60.4%	76,303	6.7%	67.5%
9	-918	Total:	166,719	70.3	19.3	9.1	28.2	1.5	2014	38,205	106,959	2.7%	35.7%	96,229	2.6%	39.7%
	-0.55%	VAP:	125,947	73.2	18.6	6.9	25.4	1.4	2012	66,513	101,933	2.3%	65.3%	90,733	2.2%	73.3%
10	-4,574	Total:	163,063	67.0	9.2	22.3	31.2	1.8	2014	35,042	101,519	12.1%	34.5%	90,080	12.2%	38.9%
	-2.73%	VAP:	116,978	71.3	8.5	18.7	27.0	1.7	2012	58,958	94,552	11.3%	62.4%	84,947	11.2%	69.4%
11	1,062	Total:	168,699	63.3	17.8	17.5	34.9	1.7	2014	32,412	88,287	5.5%	36.7%	78,878	5.5%	41.1%
	0.63%	VAP:	128,086	67.1	17.4	13.9	31.2	1.7	2012	55,748	86,009	5.0%	64.8%	74,782	4.9%	74.5%
12	-7,064	Total:	160,573	55.2	20.4	23.4	43.1	1.7	2014	31,101	90,492	11.4%	34.4%	79,556	11.4%	39.1%
	-4.21%	VAP:	119,556	59.9	19.1	19.5	38.3	1.8	2012	52,083	86,846	10.9%	60.0%	76,529	10.7%	68.1%
13	2,980	Total:	170,617	66.9	12.8	19.5	31.9	1.3	2014	43,431	109,558	9.4%	39.6%	100,162	9.2%	43.4%
	1.78%	VAP:	131,129	71.2	11.9	15.9	27.6	1.2	2012	68,545	106,392	8.9%	64.4%	96,090	8.6%	71.3%
14	-4,450	Total:	163,187	56.3	12.7	24.4	36.6	7.1	2014	22,965	72,206	13.5%	31.8%	57,687	13.8%	39.8%
	-2.65%	VAP:	131,479	61.0	10.8	21.0	31.5	7.4	2012	41,781	66,424	12.9%	62.9%	52,246	13.0%	80.0%
15	-288	Total:	167,349	74.9	4.7	15.2	19.6	5.5	2014	44,297	114,917	7.7%	38.5%	99,362	7.7%	44.6%
	-0.17%	VAP:	120,450	77.4	4.2	13.5	17.5	5.2	2012	75,063	104,774	7.1%	71.6%	90,347	7.0%	83.1%
16	-990	Total:	166,647	66.9	6.1	25.2	30.9	2.2	2014	35,150	94,548	9.4%	37.2%	83,517	9.6%	42.1%
	-0.59%	VAP:	122,271	71.6	5.3	21.1	26.3	2.1	2012	56,193	86,710	8.8%	64.8%	75,256	8.7%	74.7%
17	-4,157	Total:	163,480	51.9	8.7	38.3	46.4	1.7	2014	36,573	93,583	23.6%	39.1%	83,432	23.6%	43.8%
	-2.48%	VAP:	121,295	56.6	8.6	33.4	41.7	1.7	2012	52,274	88,073	23.3%	59.4%	78,065	23.0%	67.0%
18	2,251	Total:	169,888	66.0	16.1	16.4	32.2	1.8	2014	30,723	89,160	7.1%	34.5%	77,746	7.1%	39.5%
	1.34%	VAP:	132,877	68.0	16.2	14.2	30.2	1.8	2012	51,510	87,053	6.4%	59.2%	74,453	6.3%	69.2%
19	4,332	Total:	171,969	79.2	11.9	7.1	18.9	1.9	2014	37,035	117,707	3.0%	31.5%	105,957	3.0%	35.0%
	2.58%	VAP:	131,682	80.7	11.3	6.3	17.5	1.8	2012	67,877	113,543	2.8%	59.8%	103,964	2.8%	65.3%
20	-7,821	Total:	159,816	74.1	4.1	20.3	24.0	1.9	2014	49,122	108,834	9.0%	45.1%	97,886	8.8%	50.2%
	-4.67%	VAP:	121,754	78.3	3.6	16.6	20.0	1.8	2012	69,173	100,671	8.5%	68.7%	89,279	8.2%	77.5%

* technical reasons, election results in Texas Legislative Council reports may vary slightly from the official election results. Complete official results for all elections are maintained by the Office of the Texas Secretary of State.
VR = Spanish surname voter registration

HOUSE DISTRICTS - PLANH358

District	Deviation		Population Total	%A	%B	%H	%BH	%O	General Election	Turnout	Total Voter Registration Total	SSVR	TO/VR	Non-Suspense Voter Registration Total	SSVR	TO/VR
101	-2,973	Total:	164,664	25.4	28.2	36.2	63.5	11.1	2014	22,412	76,365	17.2 %	29.3 %	65,386	17.5 %	34.3 %
	-1.77%	VAP	110,209	29.5	27.0	32.5	58.9	11.6	2012	42,874	69,552	16.4 %	61.6 %	58,465	16.5 %	73.3 %
102	-6,501	Total	161,136	46.4	15.0	28.7	43.1	10.5	2014	33,650	88,036	8.2 %	38.2 %	76,195	8.2 %	44.2 %
	-3.88%	VAP	122,520	51.8	13.5	24.1	37.3	10.9	2012	55,395	83,613	7.5 %	66.4 %	70,198	7.2 %	78.9 %
103	3,311	Total:	170,948	17.5	8.4	70.5	78.3	4.2	2014	16,918	61,665	36.1 %	27.4 %	52,868	38.2 %	32.0 %
	1.98%	VAP	121,837	22.4	8.9	64.3	72.7	4.9	2012	30,841	56,151	36.2 %	54.9 %	47,572	38.0 %	64.8 %
104	5,147	Total:	172,784	11.9	13.6	73.5	85.7	2.4	2014	13,665	62,566	51.6 %	21.8 %	56,738	53.3 %	24.1 %
	3.07%	VAP	115,035	15.2	13.4	69.2	82.1	2.7	2012	29,483	59,085	50.3 %	49.9 %	52,459	52.3 %	56.2 %
105	8,091	Total:	175,728	34.8	12.7	45.3	57.3	7.9	2014	25,008	78,940	21.6 %	31.7 %	68,731	22.1 %	36.4 %
	4.83%	VAP	127,590	41.0	11.9	39.2	50.7	8.4	2012	44,893	75,809	19.9 %	59.2 %	65,201	20.1 %	68.9 %
106	-5,690	Total:	161,947	67.3	9.0	16.8	25.5	7.2	2014	35,414	104,808	8.7 %	33.8 %	90,849	8.8 %	39.0 %
	-3.39%	VAP	110,568	70.4	8.2	14.7	22.6	6.9	2012	60,918	90,991	7.9 %	66.9 %	79,752	7.9 %	76.4 %
107	4,235	Total:	171,872	45.5	16.7	34.1	50.2	4.3	2014	31,526	87,872	15.5 %	35.9 %	77,964	16.0 %	40.4 %
	2.53%	VAP	123,986	52.1	14.8	28.9	43.4	4.4	2012	52,817	84,059	13.9 %	62.8 %	73,693	14.1 %	71.7 %
108	-4,404	Total:	163,233	65.9	6.8	22.4	28.8	5.2	2014	42,695	110,413	9.0 %	38.7 %	91,543	9.1 %	46.6 %
	-2.63%	VAP	133,667	68.7	6.7	19.5	26.0	5.3	2012	69,140	100,427	8.9 %	68.8 %	82,419	8.8 %	83.9 %
109	6,586	Total	174,223	17.7	58.6	23.2	80.8	1.5	2014	38,419	103,305	9.4 %	37.2 %	92,592	9.6 %	41.5 %
	3.93%	VAP	122,347	21.6	57.4	20.0	76.8	1.6	2012	66,133	97,235	8.8 %	68.0 %	85,864	9.0 %	77.0 %
110	-129	Total:	167,508	9.1	40.2	50.7	90.2	0.8	2014	17,895	74,790	21.3 %	23.9 %	67,835	22.3 %	26.4 %
	0.08%	VAP	111,827	11.6	42.5	45.5	87.5	0.9	2012	38,460	71,454	19.3 %	53.8 %	64,220	20.1 %	59.9 %
111	-674	Total	166,963	17.7	50.4	29.8	79.3	2.9	2014	34,863	95,371	13.1 %	36.6 %	85,512	13.5 %	40.8 %
	0.40%	VAP	118,393	21.6	50.4	25.5	75.3	3.1	2012	60,045	90,487	11.7 %	66.4 %	80,504	12.1 %	74.6 %
112	586	Total	167,051	42.5	15.5	30.6	45.5	12.0	2014	30,322	87,455	12.7 %	34.7 %	78,464	12.8 %	38.6 %
	0.35%	VAP	120,192	47.3	14.4	26.3	40.3	12.4	2012	51,597	82,252	11.7 %	62.7 %	73,227	11.9 %	70.5 %
113	3,781	Total	171,418	43.1	19.5	30.5	49.4	7.4	2014	30,428	88,676	14.3 %	34.3 %	79,984	14.5 %	38.0 %
	2.26%	VAP	120,834	48.8	17.9	26.0	43.6	7.6	2012	51,895	82,423	13.1 %	63.0 %	74,165	13.2 %	70.0 %
114	4,693	Total	172,330	50.2	16.7	28.3	44.6	5.2	2014	41,348	97,318	7.9 %	42.5 %	84,264	7.7 %	49.1 %
	2.80%	VAP	130,817	54.9	16.1	24.2	40.0	5.1	2012	65,216	93,082	7.4 %	70.1 %	79,230	6.9 %	82.3 %
115	4,165	Total	171,802	42.2	11.1	28.1	38.7	19.1	2014	30,776	89,403	12.4 %	34.4 %	76,437	12.6 %	40.3 %
	2.48%	VAP	127,352	46.5	10.7	24.4	34.8	18.7	2012	54,331	83,727	11.6 %	64.9 %	71,292	11.5 %	76.2 %
116	3,826	Total	171,463	24.7	6.5	63.7	69.2	6.1	2014	24,509	86,838	51.7 %	28.2 %	70,447	53.8 %	34.8 %
	2.28%	VAP	132,823	28.2	6.2	59.9	65.5	6.3	2012	43,644	79,697	51.7 %	54.8 %	62,056	53.4 %	70.3 %
117	1,055	Total:	168,692	27.6	7.0	63.2	69.3	3.1	2014	24,975	87,991	50.8 %	28.4 %	77,193	52.0 %	32.4 %
	0.63%	VAP	117,326	31.6	6.8	58.8	65.1	3.4	2012	43,302	74,244	51.2 %	58.3 %	63,947	51.9 %	67.7 %
118	-3,201	Total	164,436	23.7	3.6	71.7	74.6	1.8	2014	23,149	86,366	60.4 %	26.8 %	77,035	61.4 %	30.0 %
	1.91%	VAP	116,859	26.7	3.2	68.7	71.4	1.9	2012	41,788	82,086	59.8 %	50.9 %	71,436	60.7 %	58.5 %
119	-7,656	Total	159,981	22.8	10.1	66.3	75.3	1.9	2014	23,238	84,659	52.3 %	27.4 %	74,102	53.5 %	31.4 %
	-4.57%	VAP	114,477	26.6	9.4	62.7	71.4	2.0	2012	42,286	79,222	52.0 %	53.4 %	67,567	52.9 %	62.6 %
120	7,495	Total	175,132	23.9	27.8	46.8	72.6	3.5	2014	25,354	91,398	31.9 %	27.7 %	77,114	32.6 %	32.9 %
	4.47%	VAP	124,829	28.3	26.8	42.2	67.8	3.8	2012	47,416	85,751	30.7 %	55.3 %	69,990	31.1 %	67.7 %

For technical reasons, election results in Texas Legislative Council reports may vary slightly from the official election results. Complete official results for all elections are maintained by the Office of the Texas Secretary of State.
SSVR = Spanish surname voter registration.

HOUSE DISTRICTS - PLANH358

District	Deviation		Population Total	%A	%B	%H	%BH	%O	General Election	Turnout	Total Voter Registration Total	SSVR	TO/VR	Non-Suspense Voter Registration Total	SSVR	TO/VR
121	7,230	Total:	174,867	55.1	6.8	34.6	40.6	4.3	2014	46,620	114,377	23.5 %	40.8 %	98,018	23.7 %	47.6 %
	4.31%	VAP:	133,224	58.8	6.2	31.4	37.1	4.1	2012	73,579	108,429	22.2 %	67.9 %	91,379	22.0 %	80.5 %
122	7,547	Total:	175,184	59.7	4.1	30.2	33.8	6.5	2014	55,859	129,193	20.8 %	43.2 %	111,743	20.8 %	50.0 %
	4.50%	VAP:	128,725	62.5	3.8	27.8	31.3	6.2	2012	85,712	116,346	19.4 %	73.7 %	100,117	19.1 %	85.6 %
123	8,037	Total:	175,674	23.6	4.6	70.6	74.4	2.0	2014	29,179	90,541	55.0 %	32.2 %	77,145	56.3 %	37.8 %
	4.79%	VAP:	135,763	27.4	4.5	66.5	70.4	2.2	2012	47,839	85,979	55.1 %	55.6 %	70,813	56.6 %	67.6 %
124	7,158	Total:	174,795	19.9	8.6	69.6	77.0	3.1	2014	24,093	90,889	36.5 %	26.5 %	78,840	58.0 %	30.6 %
	4.20%	VAP:	120,503	22.9	8.4	66.0	73.7	3.4	2012	46,015	83,185	55.5 %	55.3 %	69,844	56.6 %	65.9 %
125	6,912	Total:	174,549	20.4	5.2	72.3	76.6	3.0	2014	27,076	96,604	59.7 %	28.2 %	83,807	60.9 %	32.3 %
	4.12%	VAP:	125,158	23.3	4.9	69.1	73.5	3.2	2012	48,707	92,139	59.6 %	53.4 %	77,509	60.4 %	62.8 %
126	1,619	Total:	169,256	47.4	15.4	30.4	45.1	11.6	2014	33,462	94,636	15.7 %	35.4 %	84,886	16.0 %	39.4 %
	0.97%	VAP:	123,014	47.7	14.4	26.8	40.7	11.5	2012	58,383	88,082	14.8 %	66.3 %	77,236	14.8 %	75.6 %
127	-3,654	Total:	163,983	61.6	14.2	20.5	34.2	4.2	2014	40,887	106,125	12.6 %	38.5 %	96,219	12.7 %	42.5 %
	2.18%	VAP:	115,865	65.3	12.8	18.1	30.5	4.2	2012	67,283	97,874	11.6 %	68.7 %	86,516	11.5 %	77.8 %
128	4,584	Total:	172,221	58.2	9.9	29.2	38.1	3.8	2014	30,837	94,395	18.2 %	32.7 %	85,218	18.4 %	36.2 %
	2.73%	VAP:	124,645	63.1	9.1	25.0	33.8	3.1	2012	56,731	90,725	16.9 %	62.5 %	79,911	16.9 %	71.0 %
129	6,490	Total:	174,127	55.5	9.4	23.2	32.1	12.3	2014	39,527	104,980	14.3 %	37.7 %	93,584	14.5 %	42.2 %
	3.87%	VAP:	130,457	59.3	8.6	20.4	28.6	12.1	2012	65,638	99,272	13.3 %	66.1 %	85,980	13.3 %	76.3 %
130	7,895	Total:	175,532	64.7	8.4	20.4	28.1	7.2	2014	42,645	110,015	11.7 %	38.8 %	100,843	11.8 %	42.3 %
	4.71%	VAP:	122,108	67.8	7.7	17.7	25.2	7.0	2012	70,547	99,225	10.7 %	71.1 %	88,923	10.6 %	79.3 %
131	7,590	Total:	175,227	7.7	42.0	44.6	85.5	6.8	2014	24,229	79,235	19.9 %	30.6 %	71,127	20.7 %	34.1 %
	4.53%	VAP:	121,368	9.5	42.4	41.2	82.7	7.9	2012	44,400	74,094	18.6 %	59.9 %	63,989	19.6 %	69.4 %
132	5,336	Total:	172,973	42.6	14.5	36.2	49.9	7.5	2014	31,468	96,167	20.6 %	32.7 %	86,440	21.0 %	36.4 %
	3.18%	VAP:	117,666	46.8	13.1	33.0	45.5	7.6	2012	53,941	83,865	19.4 %	64.3 %	73,290	19.5 %	73.6 %
133	3,764	Total:	171,801	62.8	9.5	16.0	25.0	12.2	2014	47,301	106,614	7.6 %	44.4 %	94,605	7.2 %	50.0 %
	2.25%	VAP:	135,423	65.0	8.9	14.7	23.2	11.8	2012	74,611	103,308	7.3 %	72.2 %	89,042	6.6 %	83.8 %
134	6,784	Total:	174,423	68.8	5.2	14.1	19.1	12.0	2014	54,001	121,376	8.0 %	44.5 %	105,558	7.7 %	51.2 %
	4.05%	VAP:	143,575	70.1	5.2	13.3	18.3	11.6	2012	83,988	115,738	7.9 %	72.6 %	99,064	7.6 %	84.8 %
135	4,785	Total:	172,422	40.8	16.2	31.9	47.2	11.9	2014	30,274	91,373	18.4 %	33.1 %	81,953	18.6 %	36.9 %
	2.85%	VAP:	121,136	44.7	15.1	28.5	43.0	12.3	2012	55,193	84,009	17.2 %	65.7 %	73,287	17.2 %	75.3 %
136	-3,261	Total:	164,376	66.7	5.7	18.5	23.8	9.6	2014	39,374	107,809	11.2 %	36.5 %	91,865	11.3 %	42.9 %
	1.94%	VAP:	116,361	69.8	5.1	16.3	21.1	9.1	2012	64,898	96,796	10.7 %	67.0 %	80,451	10.5 %	80.7 %
137	3,442	Total:	171,079	16.0	18.9	55.7	73.4	10.6	2014	12,544	50,649	20.2 %	24.8 %	41,076	20.7 %	30.5 %
	2.05%	VAP:	127,834	18.8	19.2	51.5	69.6	11.6	2012	25,893	48,612	19.9 %	53.9 %	36,258	19.9 %	71.4 %
138	5,422	Total:	173,059	34.8	9.7	46.3	54.9	10.3	2014	26,814	80,595	22.0 %	33.3 %	72,343	22.0 %	37.1 %
	3.23%	VAP:	124,435	39.7	8.9	41.3	49.5	10.8	2012	47,135	76,297	20.6 %	61.8 %	67,022	20.3 %	70.3 %
139	8,066	Total:	175,733	13.9	41.8	39.9	80.7	5.3	2014	28,474	91,426	18.7 %	31.1 %	82,952	19.2 %	34.3 %
	4.83%	VAP:	123,875	17.1	42.1	35.8	77.1	5.8	2012	52,237	87,345	17.4 %	59.8 %	75,882	17.9 %	68.8 %
140	3,090	Total:	170,732	8.5	11.0	79.4	89.5	1.9	2014	11,077	56,097	57.5 %	19.7 %	51,848	58.9 %	21.4 %
	1.85%	VAP:	112,332	11.3	11.3	75.8	86.4	2.3	2012	24,230	53,240	55.2 %	45.5 %	47,680	56.9 %	50.9 %

For technical reasons, election results in Texas Legislative Council reports may vary slightly from the official election results. Complete official results for all elections are maintained by the Office of the Texas Secretary of State.
SSVR = Spanish surname voter registration.

with Voter Registration Comparison

HOUSE DISTRICTS - PLANH358

District	Deviation		Population Total	%A	%B	%H	%BH	%O	General Election	Turnout	Total Voter Registration Total	SSVR	TO/VR	Non-Suspense Voter Registration Total	SSVR	TO/VR
141	-1,139	Total:	166,498	8.4	49.0	41.2	89.2	2.4	2014	18,578	74,114	16.3 %	25.1 %	63,870	16.8 %	29.1 %
	-0.68%	VAP:	113,951	10.6	50.0	37.6	86.8	2.6	2012	38,964	69,020	15.2 %	56.5 %	56,480	15.4 %	69.0 %
142	-8,096	Total:	159,541	16.1	42.9	39.6	81.5	2.4	2014	22,217	76,482	20.1 %	29.0 %	68,835	20.8 %	32.3 %
	-4.83%	VAP:	113,288	18.4	44.8	35.0	79.1	2.5	2012	42,467	71,024	18.4 %	59.8 %	62,034	19.1 %	68.5 %
143	-422	Total:	167,215	13.0	13.1	73.2	85.5	1.5	2014	14,741	63,772	54.3 %	23.1 %	57,749	55.5 %	25.5 %
	-0.25%	VAP:	113,877	16.0	13.4	69.4	82.3	1.8	2012	31,353	62,586	53.0 %	50.1 %	54,968	54.3 %	57.0 %
144	5,778	Total	161,859	20.6	4.0	74.9	78.3	1.1	2014	12,018	55,178	55.1 %	21.8 %	49,196	56.3 %	24.4 %
	3.45%	VAP:	108,509	25.6	3.8	69.8	73.1	1.3	2012	24,782	54,305	52.6 %	45.6 %	45,997	53.4 %	53.9 %
145	-3,063	Total:	164,574	16.0	7.1	74.4	80.7	3.3	2014	15,856	63,226	54.9 %	25.1 %	56,399	56.5 %	28.1 %
	-1.83%	VAP:	116,918	19.8	7.4	69.8	76.6	3.7	2012	30,403	60,040	54.4 %	50.6 %	51,689	56.3 %	58.8 %
146	6,848	Total:	174,485	16.3	44.4	31.0	74.5	9.2	2014	27,971	86,913	10.8 %	32.2 %	74,730	11.1 %	37.4 %
	4.09%	VAP:	130,444	19.3	43.7	27.3	70.2	10.4	2012	51,346	84,785	9.9 %	60.9 %	69,742	10.1 %	73.6 %
147	8,236	Total:	175,873	20.8	38.3	36.0	73.5	5.7	2014	31,061	99,839	16.6 %	31.1 %	85,657	17.3 %	36.3 %
	4.91%	VAP:	136,034	25.1	38.2	31.2	68.7	6.2	2012	55,699	94,288	15.6 %	59.1 %	77,051	16.2 %	72.3 %
148	3,174	Total	170,811	25.0	7.1	66.4	72.8	2.3	2014	24,142	75,432	40.0 %	32.0 %	67,109	40.9 %	36.0 %
	1.89%	VAP:	125,873	30.0	6.8	61.1	67.4	2.5	2012	40,309	71,770	40.5 %	56.2 %	61,737	41.3 %	65.3 %
149	3,065	Total	170,702	17.8	26.2	36.7	61.7	20.4	2014	21,893	80,205	18.8 %	27.3 %	70,927	19.4 %	30.9 %
	1.83%	VAP:	121,535	20.3	24.4	33.8	57.3	22.4	2012	42,816	75,802	18.1 %	56.5 %	64,525	18.7 %	66.4 %
150	1,098	Total:	168,735	55.5	14.4	23.8	37.6	6.9	2014	38,925	105,485	13.4 %	36.9 %	95,554	13.6 %	40.7 %
	0.65%	VAP:	120,462	59.7	12.8	21.0	33.5	6.8	2012	65,818	94,180	12.5 %	69.9 %	83,268	12.6 %	79.0 %

ical reasons, election results in Texas Legislative Council reports may vary slightly from the official election results. Complete official results for all elections are maintained by the Office of the Texas Secretary of State.
Spanish surname voter registration

Supreme Court, U.S.
FILED
SEP 25 2015
OFFICE OF THE CLERK

No. 14-940

In the Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF TEXAS, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Texas

BRIEF FOR *AMICI CURIAE* TEXAS SENATORS IN SUPPORT OF THE APPELLEES

Chad Dunn
Counsel of Record
K. Scott Brazil
Abbie J. Kamin
BRAZIL & DUNN LLP
4201 Cypress Creek Pkwy
#530
Houston, Texas 77068
(281) 580-6310
Chad@Brazilanddunn.com

Martin J. Siegel
LAW OFFICES OF MARTIN J. SIEGEL
2222 Dunstan Road
Houston, Texas 77005
(281) 772-4568
Martin@Siegelfirm.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Constituent Service is a Fundamental Aspect of Representation and Serves Important Individual and Governmental Interests 3

II. Texas Senators Devote Much of Their Time to Constituent Service and Consider it a Core Responsibility of Representation 10

III. Using Voter Status as the Basis for Equalizing Districts Would Limit *Amici's* Ability to Serve Their Constituents 16

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Calderon v. City of Los Angeles,
481 P.2d 489 (Cal. 1972) 7, 8, 17, 19

Garza v. County of Los Angeles,
918 F.2d 763 (9th Cir. 1990) 17, 19

McCormick v. United States,
500 U.S. 257 (1991) 7

McCutcheon v. F.E.C.,
134 S. Ct. 1434 (2014) 3

Newell v. Brown,
981 F.2d 880 (6th Cir. 1992) 7

United States v. Brewster,
408 U.S. 501 (1972) 7

United States v. Jefferson,
674 F.3d 332 (4th Cir. 2012) 8

United States v. Judicial Watch, Inc.,
371 F.3d 824 (D.C. Cir. 2004) 7

Veith v. Jubelirer,
541 U.S. 267 (2004) 17

Williams v. United States,
71 F.3d 502 (5th Cir. 1995) 7

CONSTITUTION

Tex. Const. art. III §§ 5, 24, 40 11

OTHER AUTHORITIES

Edmund Burke, *Speech to the Electors of Bristol, November 3, 1774*, *in* THE FOUNDERS' CONSTITUTION (Phillip B. Kurland and Ralph Lerner, eds., U. Chicago Press and Liberty Fund), http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html 3, 4

John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576 (Dec. 1997) 4

Richard L. Hasen, *Only Voters Count?*, SLATE (May 26, 2015), www.slate.com/articles/news_and_politics/jurisprudence/2015/05/evenwel_v_abbott_supreme_court_case_state_districts_count_voters_or_total.html 16

Incumbency Advantage and Accountability: The Question of Campaign Finance, Congressional Perquisites, and Constituent Service, 23 CUMB. L. REV. 61 (1993) 6

Samuel Issacharoff, *Supreme Court Destabilization of Single Member Districts*, 1995 U. CHI. LEGAL F. 205 (1995) 12

Malcolm E. Jewell, REPRESENTATION IN STATE LEGISLATURES (University Press of Kentucky 1982) 12

John R. Johannes, TO SERVE THE PEOPLE, CONGRESS AND CONSTITUENCY SERVICE 225 (U. Nebraska Press 1984) ..... *passim*

Legislative Reference Library of Texas, *Legislators and Leaders, Membership Statistics for the 84th Legislature*, www.lrl.state.tx.us/legeleaders/members/memberstatistics.cfm 17

Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1 (Oct. 1996) 4, 5, 8

Sean McElwee, *Why the Voting Gap Matters*, DEMOS (Oct. 23, 2014), www.demos.org/publication/why-voting-gap-matters 16

Matthew S. Mendez, *Who Represents the Interests of Undocumented Immigrants? A Study of State Legislators* (Dec. 15, 2013), *available at* http://ssrn.com/abstract=2592754 12

Thomas P. O'Neill, Jr. with William Novak, MAN OF THE HOUSE (Random House 1987) 5

Richard J. Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469 (Nov. 1985) 4

The Speeches of the Right Hon. Edmund Burke (J. Burke ed. 1867) 3

Juana Summers, *Constituent Services Give Voters Something to Remember* (NPR radio broadcast Oct. 28, 2014), *available at* http://www.npr.org/2014/10/28/359615965/constituent-services-give-voters-something-to-remember 7

Texas Legislative Council, *Texas Redistricting, District Population Analysis With County Subtotals, Senate Districts, Plan S172* (March 17, 2015), ftp://ftpgis1.tlc.state.tx.us/District/Viewer/Senate/Plan S172r100.pdf 10

TEXAS LEGISLATURE ONLINE, *SB 367*, www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=84R&Bill=SB367 15

Tex. Senate Resolution 1, January 13, 2015, *available at* http://www.legis.state.tex.us/tlodocs/84R/billtext/html/SR000001F.htm 11

Tex. Senate Resolution 1075, June 1, 2015, *available at* http://www.legis.state.tex.us/tlodocs/84R/billtext/html/SR01075F.htm 11

Strom Thurmond, *Statement by Senator Strom Thurmond*, LEADERS LECTURE SERIES (2002), www.senate.gov/artandhistory/history/common/generic/Leaders_Lecture_Series_Thurmond.htm 6

Woodrow Wilson, *Congressional Government* (1885) 9

INTEREST OF *AMICI CURIAE*[1]

Amici Rodney G. Ellis, Sylvia Garcia, Juan "Chuy" Hinojosa, Eduardo A. Lucio, Jr., José Menéndez, José R. Rodríguez, Carlos I. Uresti, Kirk Watson, Royce West, John Whitmire, and Judith Zaffirini are Texas Senators. As such, they are directly interested in the way their districts are apportioned, as are their constituents. They file this brief because they believe equalizing districts by voters rather than people would seriously compromise their ability to provide vital constituent services to everyone they represent – voters and non-voters alike. They see assisting constituents with individual complaints about government and private entities as an essential part of their jobs as elected representatives, and they want to inform the Court about the magnitude and range of the constituent services they routinely perform. They respectfully submit that the Court should take their perspective into account when formulating the rule that will shape their districts.

While this brief focuses on the effects of Appellants' position on constituent services, *Amici* also more generally oppose the notion that only those eligible to vote should be counted in apportionment. Precedent, constitutional text, and the absence of workable standards and data needed to implement Appellants'

---

[1] Pursuant to Supreme Court Rule 37.3(a), Appellants and Appellees submitted letters granting blanket consent to the filing of *amicus curiae* briefs in this case. No party authored this brief in whole or in part, and no persons or entities other than *amici curiae* or their counsel have made a monetary contribution to the preparation or submission of this brief.

proposal all support using population as the basis for districting. Since these positions will be developed by Appellees and others, however, *Amici* focus their attention on how voter-based apportionment would handicap their provision of vital constituent services.

SUMMARY OF ARGUMENT

Constituent service is a core function of elected representatives. As one Congressman put it, "I thought I was going to be Daniel Webster and I found that most of my work consisted of personal work for constituents." John R. Johannes, TO SERVE THE PEOPLE, CONGRESS AND CONSTITUENCY SERVICE 5 (U. Nebraska Press 1984). Texas Senators are no different. Together, *Amici* assist thousands of people with problems relating to Medicare and Medicaid, education, criminal justice, veterans' programs, and so on. Their work not only helps individual Texans, it leads to more effective and responsive government because constituents' complaints often prompt committee investigations, corrective legislation, and internal agency reform.

If Appellants prevail, however, accessibility and constituent service will suffer. Basing apportionment on voters rather than population would cause *Amici's* largely urban, low-income districts to grow as they absorb more non-voters. More districts would be composed of suburban and rural residents, while fewer Senators would represent more poor people, children, and non-citizens. These are precisely the people whose greater social needs generate more requests for help from elected officials. Forced to serve larger, more disadvantaged districts, *Amici* could not provide the same level of constituent service. The Court should

take this inevitable harm into account in deciding this appeal.

ARGUMENT

I. Constituent Service is a Fundamental Aspect of Representation and Serves Important Individual and Governmental Interests

There is broad agreement among legislators, courts, scholars, and citizens that elected representation today does not simply consist of crafting and voting on legislation – it also entails ongoing and effective constituent service. In fact, some analysts believe this has become legislators' primary job in an era when more and more people interact with the administrative state. Moreover, constituent service yields crucial benefits to individuals and society as a whole.

1. Before the United States came into being, Edmund Burke had already attracted attention for his thinking about the legislator's duty to his constituents. As he "explained in his famous speech to the electors of Bristol, a representative owes constituents the exercise of his 'mature judgment,' but judgment informed by 'the strictest union, the closest correspondence, and the most unreserved communication with his constituents.'" *McCutcheon v. F.E.C.*, 134 S. Ct. 1434, 1461-62 (2014) (quoting *The Speeches of the Right Hon. Edmund Burke* 129–130 (J. Burke ed. 1867)). When voting, representatives should not be mere conduits for their constituents' wishes, but constituents' "business" deserves a legislator's "unremitting attention." Edmund Burke, *Speech to the Electors of Bristol, November 3, 1774*, *in* THE FOUNDERS' CONSTITUTION

(Phillip B. Kurland and Ralph Lerner, eds., U. Chicago Press and Liberty Fund), http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html.

In the United States today, Burke's vision is the norm. Some commentators believe "legislators devote *most* of their time and energy to constituent service, rather than to evaluation of legislative policy options, because constituent service is more important to a legislator's prospects for reelection." Richard J. Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 491 (Nov. 1985) (emphasis added). Indeed, "there is a virtual consensus among political scientists today that 'casework,' or individual constituent services, constitutes the average legislator's principal function." John Hart Ely, *Standing to Challenge Pro-Minority Gerrymanders*, 111 HARV. L. REV. 576, 588 (Dec. 1997). Political scientist John R. Johannes, who conducted an important study of constituent service in Congress three decades ago, concluded that "Congress – or, more properly, each individual congressional office – has become the ombudsman of the American political system.... Constituency service has increased dramatically in the past two decades." Johannes, *supra* at 225.

Legislators now see accessibility to constituents and helping them with individual problems as an indispensable part of their work. "Members themselves are among the strongest boosters of constituent service. They and other proponents of casework maintain that the ombudsman role is basic to the job of being a member of Congress – an essential aspect of what it means to 'represent' one's

constituents." Ronald M. Levin, *Congressional Ethics and Constituent Advocacy in an Age of Mistrust*, 95 MICH. L. REV. 1 n. 76 (Oct. 1996). This is confirmed in innumerable accounts from legislators themselves. Former House Speaker Tip O'Neill described learning this lesson from the legendary Boston pol Michael Curley:

> In 1937, when I was a freshman in the Massachusetts state legislature, Curley, who had just completed his term as governor, invited me to his office and gave me some excellent advice on dealing with constituents. "Over the years," he said, "hundreds and hundreds of people will come to your office and ask you for favors. Some of these favors may be great, and some of them may be small. Some may be important, and some may be trivial. Some will be easy, some will be difficult.
>
> "But always remember, for the person who comes to you, that favor is the most important thing in the world. If he could take care of it himself, he wouldn't be here. So treat them all alike and try to help everybody – no matter how big or how small the problem is."
>
> I was inclined in that direction anyway, and I followed Curley's policy all the way up the ladder.

Thomas P. O'Neill, Jr. with William Novak, MAN OF THE HOUSE 30 (Random House 1987).

These sentiments, shared widely in Congress, were echoed by O'Neill's successor, former Speaker Jim Wright of Texas:

> For many millions of private citizens, their elected representative is the only person whom they remotely know in the federal government. He is their only intercessor when they encounter difficulties. This particular relationship between a congressman and the individual constituent, struggling for opportunity, is a very sacred one, not to be despised. It is, in fact, essential if we are to keep government accessible and to keep government human.

Incumbency Advantage and Accountability: The Question of Campaign Finance, Congressional Perquisites, and Constituent Service, 23 CUMB. L. REV. 61, 67 (1993) (remarks of Jim Wright).

Nor is this view confined to Democrats. Former Senator Strom Thurmond, known for especially responsive constituent service, believed that legislators "owe it to the people who send us here to help them navigate the sometime baffling maze of the federal bureaucracy.... Constituent service is not an antiquated notion, it is part and parcel of why we are here." Strom Thurmond, *Statement by Senator Strom Thurmond*, LEADERS LECTURE SERIES (2002), www.senate.gov/artandhistory/history/common/generic/Leaders_Lecture_Series_Thurmond.htm. As another Republican senator put it: "If there weren't 535 people in Washington to come to the rescue of the average citizen, only God knows what more lashes those bureaucrats would lay on the backs of people. Why, those people in the agencies make life impossible." Johannes, *supra*, at 16. In the 2014 campaign, Kentucky Senator and now Senate Majority Leader Mitch McConnell touted his service for a

constituent whose daughter had been abducted in a custody dispute. *See* Juana Summers, *Constituent Services Give Voters Something to Remember* (NPR radio broadcast Oct. 28, 2014), *available at* http://www.npr.org/2014/10/28/359615965/constituent-services-give-voters-something-to-remember.

Like legislators, this Court has also recognized the centrality of constituent service to the task of the modern elected representative, calling it "the everyday business of a legislator." *McCormick v. United States*, 500 U.S. 257, 272 (1991). Over forty years ago, the Court noted that members of Congress take on "a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts," and the like. *United States v. Brewster*, 408 U.S. 501, 512 (1972). "The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections.... [T]hese are entirely legitimate activities." *Id.* Lower courts have repeatedly made the same point.[2]

---

[2] See, e.g., *United States v. Judicial Watch, Inc.*, 371 F.3d 824, 830 (D.C. Cir. 2004) (quotation omitted) ("our political system accepts and even applauds" constituent service); *Williams v. United States*, 71 F.3d 502, 507 (5th Cir. 1995) ("Besides participating in debates and voting on the Congressional floor, a primary obligation of a Member of Congress in a representative democracy is to serve and respond to his or her constituents"). *Newell v. Brown*, 981 F.2d 880, 886-87 (6th Cir. 1992) (in writing correctional officials, congressman "was simply providing the kind of 'constituent service' that every member of Congress renders routinely upon request"); *Calderon v. City of Los Angeles*, 481 P.2d 489, 494 (Cal.

Constituent services have also been held to constitute "official acts" under the federal bribery law governing members of Congress. *See United States v. Jefferson*, 674 F.3d 332, 337, 351-57 (4th Cir. 2012).

2. Not simply a tool to promote reelection, constituent service is a boon to individuals and government in general. On the most basic level, it enables people who need help to obtain necessary information and qualify for crucial services. For them, an elected representative's intervention is the main and most direct benefit government can provide: "Casework by legislators fits the American system of government. Representation – literally a 're-presentation' – of constituents occurs where it affects them in a most practical fashion... For many people, asking help on personal problems is their first and only direct contact with Congress." Johannes, *supra*, at 225.

Not surprisingly, then, "[s]tudies have consistently shown broad public support for congressional casework." Levin, *supra*, at 32. Effective constituent service may also boost public confidence in government. In Johannes's study, "a surprisingly large number of congressmen and their aides [we]re convinced that casework prevents public cynicism about government... 'People are so grateful just to hear a response. There's no more important function for a congressional office than to give constituents the feeling that they have access to government.'" Johannes, *supra*, at 184.

1972) ("Furthermore, much of a legislator's time is devoted to providing services and information to his constituents, both voters and nonvoters").

Beyond helping individuals resolve discrete problems, constituent service improves how government functions. Complaints alert representatives to problems in government and thus help the legislature fulfill its oversight role. "According to the vast majority of members and staffers interviewed, case and project work provides low-cost, generally accurate intelligence, along with a good dose of motivation." Johannes, *supra*, at 162. As one staffer put it: "You find out what's happening in the agencies. We don't have time to read the *Federal Register*, so cases tell us what's going on. Even one case can open up a whole world." *Id.* at 163. A "representative body... is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served." Woodrow Wilson, *Congressional Government* 303 (1885).

Armed with information from constituents, legislators can act to bring about broader change. They can begin investigations, hold hearings, and compel testimony from agency officials or private citizens that expose shortcomings in administration or gaps in existing law. They can devise new legislation targeting problems revealed by constituents, or change their votes on bills already pending. "Several representatives and staffers, for example, commented that casework – and unusually good or bad experiences with agencies on cases – had affected floor voting on bills and decisions to cosponsor." Johannes, *supra*, at

165. Legislators can also complain directly to agencies, prompting internal reform:

> Finally, as a result of incoming congressional complaints and requests, departments and agencies might change regulations or procedures, conduct their own internal oversight, or, at the least, become more aware of problems and be more careful when similar cases arise. The process of dealing with "congressionals," moreover, might help sensitize bureaucrats to the human consequences of their rules, regulations and operations.

Id. at 162. . All these responses can improve governmental performance, benefitting everyone.

II. Texas Senators Devote Much of Their Time to Constituent Service and Consider it a Core Responsibility of Representation

These facts about constituent service apply as fully to the Texas Senate as to any American legislative body. *Amici* and all members of the Texas Senate spend much, if not most, of their time, energy, and staff resources on responding to requests for constituent service. Their efforts benefit individual residents as well as Texas as a whole.

The mean population of Texas' 31 Senate districts is approximately 811,000, with the smallest district containing 778,341 people and the largest 843,567. *See* Texas Legislative Council, *Texas Redistricting, District Population Analysis With County Subtotals, Senate Districts, Plan S172* (March 17, 2015), ftp://ftpgis1.tlc.state.tx.us/District/Viewer/Senate/PlanS172r100.pdf. Each Texas Senator receives the same amount to hire

staff-members regardless of population disparities among districts, and each Senator employs several staffers.[3] Senators allocate the duties of staff-members differently, assigning some to full-time constituency work, some to legislative work only, and some to both. But all *Amici* have multiple staff-members handling constituent complaints. State and federal agencies employ liaisons to respond to inquiries from legislators' offices.

Amici and other Texas Senators are inundated with requests from constituents for help with various individual problems. The Texas legislature meets once every two years in sessions lasting no more than 140 days, plus occasional 30-day special sessions called by the governor. *See* TEX. CONST. art. III §§ 5, 24, 40. *Amici* together receive thousands of constituent inquiries during each of these two-year cycles. Particularly when the Senate is not in session – typically sixteen to eighteen months at a time – most of *Amici's* staffers work on constituent services. One *Amicus* Senator estimates that 70% of her and her staff's time when the Senate is not meeting is spent answering, investigating, and trying to resolve constituent complaints. *Amici* devote such a large portion of their time to constituent service because they see it as a central part of their duty as representatives.

---

[3] *See* Tex. Senate Resolution 1075, § 7(b), June 1, 2015, *available at* http://www.legis.state.tex.us/tlodocs/84R/billtext/html/SR01075F.htm (Senators each budgeted $38,000/month for staff and travel while Senate out of session); Tex. Senate Resolution 1, § 10(a), January 13, 2015, *available at* http://www.legis.state.tex.us/tlodocs/84R/billtext/html/SR000001F.htm (Senators each budgeted staff salaries of $40,000/month while Senate in session during 2015).

As one *Amicus* Senator puts it: "If you don't demonstrate that you're responsive and will take care of them, they lose faith in government."

Moreover, as Democrats representing mostly urban districts, *Amici's* constituents are disproportionately people with lower incomes and new immigrants. These groups have greater social needs and more interactions with government agencies, which in turn generate more requests for help from Senators. This additional level of demand from constituents who need more social services is not unique to Texas. *See* Samuel Issacharoff, *Supreme Court Destabilization of Single Member Districts*, 1995 U. CHI. LEGAL F. 205, 231 (1995) (quoting MALCOLM E. JEWELL, REPRESENTATION IN STATE LEGISLATURES 145 (University Press of Kentucky 1982)) ("Thus, as a general rule, 'the demand for constituent services is greater in districts that are below average in socioeconomic terms'").

Amici provide constituent services to people without regard for or knowledge about whether they vote, or their partisan affiliation. They do the same irrespective of citizenship – as has also been documented more generally. *See* Matthew S. Mendez, *Who Represents the Interests of Undocumented Immigrants? A Study of State Legislators* (Dec. 15, 2013), *available at* http://ssrn.com/abstract=2592754 (state legislators, including members from Texas, provide services to undocumented immigrants in their districts without regard to citizenship, albeit at potentially lower levels of responsiveness, and Hispanic legislators generally provide equal service to aliens).

The problems for which *Amici's* constituents seek help involve health care programs, criminal justice and

incarceration, immigration rules, education, child support and custody, state and federal programs for veterans, services for elderly and disabled people, workers' compensation and unemployment benefits, taxes and government fees, obtaining licenses, neighborhood nuisances, environmental complaints, grant applications, and more.

For example, difficulties with Medicare and Medicaid are a recurring source of requests. Constituents call Senators because they have trouble enrolling, are unsure about eligibility, are denied coverage, seek home healthcare for parents, need replacement cards, and so on. *Amici's* staffers provide information about how the programs work and, when needed, communicate with state and federal administrative personnel to obtain information and try to resolve constituent complaints. Other typical health-related inquiries concern state-provided rehabilitation services, homecare for aged and disabled residents, medical and mental health care and counseling for veterans, and vaccination.

Constituents also frequently call *Amici* Senators' offices seeking help with problems related to criminal justice and family members' incarceration. They may complain about what they perceive to be an unjustified stop or arrest, wrongful or excessive charges, poor treatment by police officers or jail employees, the inability to obtain state funds set aside for victims of crime, and so on. As for incarceration, requests seek aid in arranging transfers of prisoners to facilities closer to home, obtaining parole, securing better medical care or treatment for substance abuse, or changing the conditions of confinement in some other

way. *Amici's* staff-members work with the Texas Department of Criminal Justice Ombudsman's office or other applicable law enforcement agencies to investigate the issue and ensure appropriate personnel respond to constituents.

Requests regarding education and child welfare are frequent, too. Parents call Senators' offices with questions and complaints about how and where to enroll children in school, unjustified disciplinary measures, lax responses by teachers and administrators to bullying, immigration- and language-related issues, obtaining special education for children with disabilities, truancy charges, and the like. Child custody and protection inquiries are also common; parents approach *Amici* about actions taken by estranged spouses, Texas Child Protective Services caseworkers, family court judges, and law enforcement officers. *Amici's* staffers provide relevant information and often act as temporary intermediaries with school and state officials.

Aside from responding to specific complaints, *Amici* also affirmatively reach out to residents and help provide needed community services. For example, some *Amici* Senators participate in back-to-school events in their districts with school officials, private sector partners, and nonprofit organizations. Volunteers distribute backpacks and other supplies; students get vision tests, dental exams, and immunizations; and parents receive important information about school. Over 1,000 children attend some of these events. *Amici* are often asked to and do take part in similar kinds of community outreach programs at Thanksgiving, Christmas, and other

holidays. They also help local nonprofit groups in their districts apply for grant funding and coordinate with state agencies.

Amici frequently use information acquired in helping constituents to propose legislation, hold hearings, prod state and local officials, and try to effect broader change. In one case, an *Amicus* Senator received repeated constituent complaints about bars that appeared to be unlicensed but served alcohol in residential neighborhoods. In response, she devised a bill to criminally penalize unauthorized users of Texas Alcoholic Beverage Commission permits, whereas previous law only covered existing permit-holders who let unlicensed vendors falsely display their permits. The bill passed the legislature in the 2015 session and was signed into law by the governor. *See* TEXAS LEGISLATURE ONLINE, *SB 367*, www.legis.state.tx.us/BillLookup/Text.aspx?LegSess=84R&Bill=SB367.

In another example, the same Senator received several complaints about poor service and undrinkable water provided by a privately owned water company in a low-income part of her district just outside Houston's city limits. The complaints led the Senator and a House member to organize a community forum for affected customers. Their staffers then assisted residents in preparing a complaint to the Texas Public Utility Commission, which is now adjudicating the matter.

Overall, *Amici* provide vital assistance to individual constituents and thereby improve government in general – and they do so without regard to whether the people they help are voters. Their work flows from their conviction that accessibility to the public and

constituent service lie at the heart of their duty as elected representatives.

III. Using Voter Status as the Basis for Equalizing Districts Would Limit *Amici's* Ability to Serve Their Constituents

Amici's constituents will suffer if Texas is forced to apportion Senate districts according to voter status rather than population. With more constituents packed into their districts, particularly those with especially acute social needs, *Amici* will not be able to deliver the same level of service and responsiveness – that is, the same basic quality of representation – to residents.

The districting rule proposed by Appellants would result in fewer and more populous urban districts composed of a greater proportion of non-voting, low-income residents and new immigrants. People with lower incomes vote in lower numbers than affluent people. *See* Sean McElwee, *Why the Voting Gap Matters*, DEMOS (Oct. 23, 2014), www.demos.org/publication/why-voting-gap-matters. Non-citizens, children, and people convicted of crimes whose voting rights have not been restored can't vote at all. All these groups tend to be concentrated in urban areas. *See, e.g.*, Richard L. Hasen, *Only Voters Count?*, SLATE (May 26, 2015), www.slate.com/articles/news_and_politics/jurisprudence/2015/05/evenwel_v_abbott_supreme_court_case_state_districts_count_voters_or_total.html. Thus, adopting Appellants' proposed rule would result in more rural and relatively affluent districts while fewer members represent poorer, urban, non-voters, who will be invisible when it comes to apportionment. *Amici's* districts would likely grow significantly beyond

their current average of 811,000 constituents. As the California Supreme Court recognized: "A district which, although large in population, has a low percentage of registered voters would, under a voter-based apportionment, have fewer representatives to provide [constituent] assistance and to listen to concerned citizens." *Calderon*, 481 P.2d at 493.

The effect of more populous districts filled with greater numbers of people with unmet social needs would, inevitably, be a lower level of accessibility and service delivered to all constituents in those districts. *Amici* would have to hire more staff-members to accommodate the increased population, especially considering that the new people would be more likely to need and seek their help. Yet every Texas Senator is budgeted the same staff resources regardless of the size of her district. *See* n. 3, *supra*. Nor, frankly, is there much prospect of that changing in order to better serve non-voting members of the public in Democratic districts, given Democrats' minority party status in the Texas Senate. *See, e.g., Veith v. Jubelirer*, 541 U.S. 267, 363 (2004) (Breyer, J., dissenting) ("the party that controls the process has no incentive to change it").[4] Consequently, *Amici* would likely have to divide the same resources they get now among more constituents, diminishing the service they and their staffs can provide. *See, e.g., Garza v. County of Los Angeles*, 918 F.2d 763, 774 (9th Cir. 1990) ("Residents of the more populous districts thus have less access to their elected

---

[4] In the Texas Senate, Republican Senators outnumber Democrats 20 to 11. *See* Legislative Reference Library of Texas, *Legislators and Leaders, Membership Statistics for the 84th Legislature*, www.lrl.state.tx.us/legeleaders/members/memberstatistics.cfm.

representative. Those adversely affected are those who live in the districts with a greater percentage of non-voting populations"); *see also* Appellees' Brief at 57 (apportioning by population equalizes "demand for government services" and "ensur[es] that elected officials are not tasked with representing a substantially greater number of constituents than other officials"). Alternately, *Amici* could try to shift staff from policy to constituent service duties, but that would only compromise the legislative side of their representation.

Appellants more or less acknowledge the reality that their proposed rule would reduce the level of constituent service, but they claim it doesn't matter. Asserting that "representational equality is not an interest on par with the fundamental right to an equal vote," they recognize that constituents will petition their representatives but argue that there is no right to anything in response: "A constituent is entitled to mail, call, or visit his elected representative's office. But he has no right to have that letter opened, call returned, or have his meeting request accepted – even if the representative reads the letters, answers the calls, or meets with other constituents of the district." Brief for Appellants 40-41.

Yet whether constituent service is conceived of as a "right" or simply as a fundamental part of modern representation, *Amici* can attest that fewer letters opened, calls answered, and meetings convened will have tangible, negative impacts on the people who most need their Senators' help. It will mean fewer people who obtain necessary healthcare, fewer corrections of government overreach for local businesses, fewer

veterans able to take advantage of available counseling and rehabilitation, fewer disabled students transferred to more appropriate classrooms, fewer nuisances and environmental violations abated, fewer investigations and hearings to address issues raised by constituents, and fewer bills translating local sentiment into systemic change. "In the words of a former Senator, 'If Congressmen don't do it, nobody will; there's a lot of people out there who need help.'" Johannes, *supra*, at 16. More amorphously perhaps, but no less important, the public's faith in government can only suffer. Put simply, *Amici's* more numerous constituents will end up getting less representation from their representatives. The Court should strive to avoid that result.

"Crucial though voting is as a method of participation in representative government, access to elected officials is also an important means of democratic expression – and one that is not limited to those who cast ballots." *Calderon*, 481 P.2d at 259 (citations omitted). In weighing what Judge Kozinski described as the "apparently conflicting principles" of "equal representation" and "electoral equality," *Garza*, 918 F.2d at 781 (Kozinski, J., dissenting), the Court should consider the concrete and harmful effects on Texans in *Amici's* districts that would flow from adoption of Appellants' position.

CONCLUSION

The Court should affirm the district court's decision.

Respectfully Submitted,

Martin J. Siegel
LAW OFFICES OF MARTIN J. SIEGEL
2222 Dunstan Road
Houston, Texas 77005
Telephone: (281) 772-4568
Martin@Siegelfirm.com

Chad Dunn
Counsel of Record
K. Scott Brazil
Abbie J. Kamin
BRAZIL & DUNN LLP
4201 Cypress Creek Pkwy, #530
Houston, Texas 77068
Telephone: (281) 580-6310
Chad@Brazilanddunn.com

Counsel for Amici Curiae

No. 14-940

In The
Supreme Court of the United States

SUE EVENWEL, *et al.*,

Appellants,

v.

GREG ABBOTT, In His Official Capacity
As Governor Of Texas, *et al.*,

Appellees.

**On Appeal From The United States District Court
For The Western District Of Texas**

BRIEF OF THE CITY OF YAKIMA, WASHINGTON AS *AMICUS CURIAE* SUPPORTING APPELLANTS

FRANCIS S. FLOYD
Counsel of Record
JOHN A. SAFARLI
FLOYD, PFLUEGER & RINGER, P.S.
200 W. Thomas St., Ste. 500
Seattle, WA 98119
(206) 441-4455
ffloyd@floyd-ringer.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

Library of Congress
Law Library

TABLE OF CONTENTS

Page

INTRODUCTION 1

INTEREST OF THE *AMICUS CURIAE* 6

SUMMARY OF THE ARGUMENT 12

ARGUMENT 13

I. The One Person, One Vote Requirement Must Provide Some Protection to Electoral Equality 13

II. This Court Should Protect Electoral Equality by Requiring Drafters of Redistricting Plans to Avoid Unnecessary CVAP Imbalance, Which is Feasible with Available Demographic Data 18

III. The One Person, One Vote Requirement Forbids the Use of Single-Member Districts in Jurisdictions Where Intolerably High CVAP Variance Cannot Be Avoided ... 22

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257 (2015) 24

Branch v. Smith, 538 U.S. 254 (2003) 26

Brown v. Thomson, 462 U.S. 835 (1983) 3

Burns v. Richardson, 384 U.S. 73 (1966) 13, 16, 17

Bush v. Vera, 517 U.S. 952 (1996) 24

Cano v. Davis, 211 F. Supp. 2d 1208 (C.D. Cal. 2002) 7

Chapman v. Meier, 420 U.S. 1 (1975) 25

Chen v. City of Houston, 206 F.3d 502 (5th Cir. 2000) 4, 14, 17

Cisneros v. Pasadena Indep. Sch. Dist., No. 4:12-CV-2579, 2014 U.S. Dist. LEXIS 58278 (S.D. Tex. April 25, 2014) 20

Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996) 14, 17

Davidson v. City of Cranston, 42 F. Supp. 3d 325 (D.R.I. 2014) 14

Fabela v. City of Farmers Branch, No. 3:10-CV-1425-D, 2012 U.S. Dist. LEXIS 108086 (N.D. Tex. Aug. 2, 2012) 11, 20

Garza v. Cnty. of Los Angeles, 918 F.2d 763 (1990) 4, 14, 17, 18

Gingles v. Thornburg, 478 U.S. 30 (1986) 7

Gray v. Sanders, 372 U.S. 368 (1963) 13, 15, 17

TABLE OF AUTHORITIES – Continued

Page

Holder v. Hall, 512 U.S. 874 (1994) 26

In re Walsh, 104 F. 518 (D.S.D. 1900) 5, 24

Large v. Fremont Cty., 709 F. Supp. 2d 1176 (D. Wyo. 2010) 19

Mahan v. Howell, 410 U.S. 315 (1973) 25

Miller v. Johnson, 515 U.S. 900 (1995) 4

Montes v. City of Yakima, 40 F. Supp. 3d 1377 (E.D. Wash. 2014) 2, 8, 9, 19

Reynolds v. Sims, 377 U.S. 533 (1964) 13, 15, 17, 23

Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) 11, 26

Wesberry v. Sanders, 376 U.S. 1 (1964) 23

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 12, 23

STATUTES

42 U.S.C. § 1973 ..... *passim*

52 U.S.C. § 10301 2

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Dianne Solís, *Farmers Branch City Council votes to drop its appeal of Voting Rights Act case*, THE DALLAS MORNING NEWS, July 22, 2013, *available at* http://thescoopblog.dallasnews.com/2013/07/farmers-branch-city-council-votes-to-drop-its-appeal-of-voting-rights-act-case.html/ 11

Kent D. Krabill & Jeremy A. Fielding, *No More Weighting: One Person, One Vote Means One Person, One Vote*, 16 TEX. REV. L. & POL. 275 (2012) 13, 14

Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 St. Louis U. Public L. Rev. 97 (2010) 25

S. REP. NO. 94-417 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177 24

U.S. CENSUS BUREAU, 2009-2013 5-YEAR AMERICAN COMMUNITY SURVEY, SEX BY AGE BY NATIVITY AND CITIZENSHIP STATUS (BLACK OR AFRICAN AMERICAN ALONE), *available at* http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/B05003B/1600000US5380010 2

U.S. CENSUS BUREAU, 2009-2013 5-YEAR AMERICAN COMMUNITY SURVEY, SEX BY AGE BY NATIVITY AND CITIZENSHIP STATUS (HISPANIC OR LATINO), *available at* http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/B05003I/1600000US5380010 2

TABLE OF AUTHORITIES – Continued

Page

U.S. CENSUS BUREAU, 2009-2013 5-YEAR AMERICAN COMMUNITY SURVEY, SEX BY AGE BY NATIVITY AND CITIZENSHIP STATUS (WHITE ALONE, NOT HISPANIC OR LATINO), *available at* http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/B05003H/1600000US5380010 2

U.S. CENSUS BUREAU, 2009-2013 5-YEAR AMERICAN COMMUNITY SURVEY, SEX BY AGE BY NATIVITY AND CITIZENSHIP STATUS, *available at* http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/B05003/1600000US5380010 1

U.S. CENSUS BUREAU, 2010 CENSUS, PROFILE OF GENERAL POPULATION AND HOUSING CHARACTERISTICS: 2010, *available at* http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/1600000US5380010 1

U.S. CENSUS BUREAU, 2010 CENSUS, TOTAL POPULATION, *available at* http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_SF2/PCT1/1600000US5380010 1

INTRODUCTION[1]

Yakima is the ninth most populous city in Washington with a total population of 91,067.[2] Approximately 41% of the total population is Latino.[3] However, according to the 2009-2013 ACS 5-Year Estimates, Latinos are only 22.74% of Yakima's citizen-voting age population ("CVAP").[4] The percentage of adult Latinos who are eligible to vote (*i.e.*, the Latino CVAP) is only 54.51% of the entire adult

---

[1] Although this brief is presented on behalf of a city, it is submitted by the city's outside legal counsel rather than the city's authorized law officer under Rule 37.4. Accordingly, Yakima makes the following disclosure pursuant to Rule 37.6: No counsel for Appellants or Appellees authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution intended to fund the preparation or submission of this brief. The parties have filed blanket consents.

[2] U.S. CENSUS BUREAU, 2010 CENSUS, TOTAL POPULATION, *available at* http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_SF2/PCT1/1600000US5380010.

[3] U.S. CENSUS BUREAU, 2010 CENSUS, PROFILE OF GENERAL POPULATION AND HOUSING CHARACTERISTICS: 2010, *available at* http://factfinder.census.gov/bkmk/table/1.0/en/DEC/10_DP/DPDP1/1600000US5380010.

[4] U.S. CENSUS BUREAU, 2009-2013 5-YEAR AMERICAN COMMUNITY SURVEY, SEX BY AGE BY NATIVITY AND CITIZENSHIP STATUS, *available at* http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/B05003/1600000US5380010.

Latino population.[5] In contrast, 99.63% and 97.65% of non-Latino white and African American adults, respectively, are eligible to vote.[6]

In 2012, Yakima was sued in the United States District Court for the Eastern District of Washington ("Eastern District of Washington") under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 ("Section 2").[7] The plaintiffs, represented by the American Civil Liberties Union ("ACLU"), claimed that Yakima's method of electing city councilmembers impermissibly diluted Latino voting strength. The plaintiffs prevailed on summary judgment at the liability phase. *Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014).

In the remedy phase, the Eastern District of Washington adopted the ACLU's proposed remedial districting plan without making any revisions. Under

---

[5] U.S. CENSUS BUREAU, 2009-2013 5-YEAR AMERICAN COMMUNITY SURVEY, SEX BY AGE BY NATIVITY AND CITIZENSHIP STATUS (HISPANIC OR LATINO), *available at* http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/B05003I/1600000US5380010).

[6] U.S. CENSUS BUREAU, 2009-2013 5-YEAR AMERICAN COMMUNITY SURVEY, SEX BY AGE BY NATIVITY AND CITIZENSHIP STATUS (WHITE ALONE, NOT HISPANIC OR LATINO), *available at* http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/B05003H/1600000US5380010; U.S. CENSUS BUREAU, 2009-2013 5-YEAR AMERICAN COMMUNITY SURVEY, SEX BY AGE BY NATIVITY AND CITIZENSHIP STATUS (BLACK OR AFRICAN AMERICAN ALONE), *available at* http://factfinder.census.gov/bkmk/table/1.0/en/ACS/13_5YR/B05003B/1600000US5380010.

[7] Recodified as 52 U.S.C. § 10301.

the plan, all seven positions on the Yakima City Council are elected through single-member districts. The plan, while roughly equalizing total population, grossly malapportioned eligible voters[8] among its districts: The plan's maximum CVAP deviation[9] is 63.98%, which far exceeds the maximum CVAP deviation in the Texas Senate Plan S172 at issue in this case (between 45.95% and 47.87%). Brief for Appellants 11, tbl. 2.

Yakima objected to the severe malapportionment of eligible voters, but the Eastern District of Washington agreed with the ACLU that massive CVAP imbalance was legally irrelevant. Yakima appealed to the United States Court of Appeals for the Ninth Circuit and requested a stay pending the disposition of this case. The stay was granted.

Yakima agrees with Appellants that this case presents a justiciable question. Yakima further agrees

---

[8] This brief uses the terms "eligible voters" and "CVAP" interchangeably.

[9] The phrase "maximum CVAP deviation" means the absolute value of the difference between the district with the highest percentage deviation from the "ideal" CVAP population and the district with the lowest percentage deviation. As an illustration, if a city has an overall CVAP of 7,000 and is divided into seven districts, then the "ideal" CVAP population for each district is 1,000. If the district with the highest CVAP has 1,250 eligible voters (or 25% above the "ideal") and the district with the lowest CVAP has 600 eligible voters (or 40% below the "ideal"), then the maximum CVAP deviation would be 65%. *See, e.g., Brown v. Thomson*, 462 U.S. 835, 842, 846 (1983).

that districts should be apportioned based on CVAP because "what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation"[10] *Garza v. Cnty. of Los Angeles*, 918 F.2d 763, 782 (1990) (Kozinski, J., concurring in part and dissenting in part). However, if this Court hesitates to overrule the existing practice of apportioning based on total population, or if this Court allows states and localities to choose their own apportionment basis, then this Court must still protect electoral equality. This Court should require that the drafter of a redistricting plan apportioned with total population should strive to equalize the CVAP among each district insofar as possible, while also adhering to "traditional race-neutral districting principles." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). This holding would balance the principles of representational and electoral equality.

This holding would also be workable with available demographic data. The Census Bureau publishes full-count data on the total population and sample-based estimates of the CVAP. As Appellees and *amici* in support of Appellees will likely argue,

---

[10] The terms "electoral equality" and "electoral balance" refer to the "principle . . . that, regardless of the size of the whole body of constituents, political power, as defined by the number of those eligible to vote, is equalized as between districts." *Garza*, 918 F.2d at 782. The term "representational equality" refers to the principle that "representatives are chosen by a district's voters, but should represent all persons resident therein." *Chen v. City of Houston*, 206 F.3d 502, 525 (5th Cir. 2000).

CVAP estimates are less precise as an apportionment basis than the full count of the total population. However, CVAP estimates can gauge the severity of electoral inequality among districts – comparatively between two plans, or relative to a benchmark (*e.g.*, the lowest feasible limit of inequality). Requiring that a redistricting plan avoid an unnecessarily extreme CVAP imbalance could be practically implemented.

Even where unnecessarily extreme electoral imbalance is avoided, a proposed redistricting plan still may register severe electoral imbalance based on CVAP disparities. In those instances, adopting a single-member district plan would require sacrificing electoral equality, the constitutional tenet at the heart of the one person, one vote requirement. Whatever the reason might be for imposing a single-member district plan in those circumstances (*e.g.*, remedying a Section 2 violation), "everything must give way" to the "superior provisions of the constitution of the United States." *In re Walsh*, 104 F. 518, 520 (D.S.D. 1900). To meaningfully protect the constitutional guarantee of the one person, one vote rule, this Court should forbid the use of single-member districts in jurisdictions where intolerably high CVAP disparities cannot be avoided.

INTEREST OF THE *AMICUS CURIAE*

Since 1977, Yakima had conducted its City Council elections under an at-large system. Elections were staggered and occurred during odd-numbered years, so that either three or four positions were contested every two years. For three of the seven positions, candidates participated in an at-large primary election. The top two candidates for each position then competed in an at-large general election.

Two years later, the remaining four positions were contested. Each of these four positions corresponded to one of four residency districts of approximately equal total population. In the primary election, only voters residing within a district could vote for candidates from that district. The top two candidates from each district then competed in an at-large general election, in which voters from anywhere in the city could cast a ballot for the district-based candidates.

In 2011, the voters of Yakima rejected a proposition that would have amended the city charter to require all councilmembers to be elected through single-member districts. Opponents of the proposition included the editorial board of local paper of record, who urged voters to reject the proposition because it did not provide any citywide representation.

One year later, Yakima and the seven councilmembers were sued under Section 2. The two plaintiffs, one a former Latino candidate for City Council and the other a Latino voter, alleged that Yakima's

method for electing councilmembers impermissibly diluted the strength of Latino voters.

The parties cross-moved for summary judgment at the close of discovery. In their motion, the plaintiffs argued that there was no genuine issue of material fact as to their Section 2 claim. The first element of their claim required the plaintiffs to show that Latinos were "sufficiently large and geographically compact" to form a majority in a single-member district.[11] For this element, the plaintiffs offered five different redistricting plans. In each plan, all seven City Council positions were elected in single-member districts. Each plan was apportioned based on total population and included a district in which Latinos were a majority of the CVAP.

In its summary judgment motion, Yakima argued that the plaintiffs' claim should be dismissed because, among other reasons, they failed to satisfy their burden under the first *Gingles* factor by presenting a constitutionally valid plan. Specifically, Yakima argued that the plaintiffs had intentionally ignored the extreme CVAP imbalances among each of their plans. Yakima showed that the maximum CVAP deviation

---

[11] This element is commonly referred to as the "first *Gingles* factor," which is one of three threshold conditions for establishing a vote dilution claim. *See Gingles v. Thornburg*, 478 U.S. 30 (1986). "The Ninth Circuit, along with every other circuit to consider the issue, has held that CVAP is the appropriate measure to use in determining whether an additional effective majority-minority district can be created." *Cano v. Davis*, 211 F. Supp. 2d 1208, 1233 (C.D. Cal. 2002) (internal citation omitted).

ranged from 61.47% to 70.72% among the five plans. Yakima further offered the deposition testimony of the plaintiffs' demographer, who admitted that he did not attempt to reduce the imbalance in CVAP among the districts in the plans he drafted for the plaintiffs and conceded that he did not even consider the CVAP disparities in his plans. Yakima argued that the plaintiffs' total disregard for electoral equality should doom their Section 2 claim.

The plaintiffs responded that severe malapportionment of eligible voters was immaterial to the validity of the plans. Agreeing with the plaintiffs, the Eastern District of Washington rejected Yakima's contention that "an imbalance in citizen voting-age population . . . is relevant to the 'one person, one vote' calculus." *Montes*, 40 F. Supp. 3d at 1397. The Eastern District of Washington granted the plaintiffs' summary judgment motion and found that Yakima's system for electing councilmembers violated Section 2. *Id.* at 1415. The parties were instructed to submit proposed remedial districting plans. *Id.*

In the remedy phase, the plaintiffs proposed one of the five plans previously submitted in the liability phase. Their proposed plan had a maximum CVAP deviation of 63.98%. The district with the fewest eligible voters (District 1, the only district where Latinos were a majority of the CVAP) had a CVAP of approximately 4,816. In contrast, the district with the most eligible voters (District 7) had a CVAP of approximately 9,847 – over twice the number of eligible voters as in District 1.

Yakima contended that the plaintiffs' plan still suffered from extreme electoral inequality and that the plaintiffs made no attempt to reduce the CVAP imbalance in their plan before proposing it in the remedy phase. The plaintiffs, as they had throughout the litigation, argued that CVAP apportionment was not a relevant redistricting criterion. The Eastern District of Washington again agreed with the plaintiffs and focused its one person, one vote analysis exclusively on whether total population was approximately equal among the districts.

The Eastern District of Washington approved the plaintiffs' plan without making any revisions. It also adopted the plaintiffs' proposal that all seven positions on the City Council would be contested in 2015, even though only four of the incumbent councilmembers were up for reelection in 2015 (the terms of the other three councilmembers did not expire until 2017). The Eastern District of Washington prematurely ended the terms of three councilmembers despite stating that there was no evidence "the City . . . engaged in any wrongdoing." *Montes*, 40 F. Supp. 3d at 1407.

After unsuccessfully moving for reconsideration, Yakima appealed both the liability and remedy phases of the case and requested that the Ninth Circuit stay its appeal pending this Court's disposition of this case. The stay was granted. *Montes v. City of Yakima*, Nos. 15-35309, 15-35593 (9th Cir.), Docs. 16, 17.

Yakima is a more extreme instance of the issue raised by Appellants in this case. The maximum CVAP deviation in the plan adopted by the Eastern District of Washington (63.98%) far exceeds that of Texas Senate Plan S172 (between 45.95% and 47.87%). Yakima also exemplifies the severe distortions that occur when electoral equality is disregarded: The voters in District 1 have more than *twice* the voting power of voters in District 7.

Furthermore, Yakima's case is more acute in terms of the neglect for the one person, one vote requirement. In this case, Appellants submitted a declaration to the three-judge panel from their expert demographer establishing that it was possible to substantially equalize the CVAP in each district within Texas Senate Plan S172 without departing from the goal of equalizing each district's total population. This conclusion implies that the drafters of Texas Senate Plan S172 could have reduced the CVAP imbalances, but chose not to. In the case against Yakima, however, no implications need to be drawn because the plaintiffs' demographer explicitly admitted that he disregarded the CVAP allocation in his plans.

Yakima submits this *amicus* brief to notify this Court of the circumstances in Yakima. Instances of extreme electoral imbalance are not confined to Texas. This issue will occur with increasing regularity due to the combination of shifting demographic trends and the efforts of organizations such as the ACLU using litigation to impose single-member districts on jurisdictions. Historically, single-member district plans

did not create extreme CVAP imbalances because total population was a reliable proxy for eligible voters. That is no longer true in many jurisdictions. Instead of applying Section 2 "in light of current conditions,"[12] many lower courts and Section 2 plaintiffs simply ignore the severe electoral imbalance that is arising with growing frequency.

Yakima further urges this Court to issue a clear ruling in this case that lower courts can readily apply. Yakima's own appeal has been stayed pending this Court's disposition of this case, and Yakima seeks a decision that can be implemented with minimal confusion once the stay is lifted. Moreover, the opportunities for this Court to clarify the meaning of the one person, one vote requirement in subsequent cases may be limited, as appeals in redistricting cases are sometimes withdrawn by a majority of the governing body elected under the new election system.[13]

---

[12] *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2627 (2013).

[13] Dianne Solís, *Farmers Branch City Council votes to drop its appeal of Voting Rights Act case*, THE DALLAS MORNING NEWS, July 22, 2013, *available at* http://thescoopblog.dallasnews.com/2013/07/farmers-branch-city-council-votes-to-drop-its-appeal-of-voting-rights-act-case.html/ (referring to *Fabela v. City of Farmers Branch*, No. 3:10-CV-1425-D, 2012 U.S. Dist. LEXIS 108086 (N.D. Tex. August 2, 2012), in which defendants argued that creating single-member district plans with extreme CVAP disparities violated the one person, one vote rule).

SUMMARY OF THE ARGUMENT

Yakima agrees with Appellants that this case presents a justiciable question, and that the one person, one vote rule of the Fourteenth Amendment's Equal Protection Clause requires districts to be apportioned based on CVAP. However, Yakima recognizes that this Court may hesitate to require states and localities to adopt a new apportionment basis. Yakima submits that representational and electoral equality both can be protected to a meaningful degree if drafters of redistricting plans apportion with total population while endeavoring to avoid unnecessary CVAP imbalance. This requirement can be practically implemented: Although citizenship statistics are based on sample data, those data are accurate and sufficiently reliable for drafters to use in determining whether extreme CVAP deviations can be avoided. Even after unnecessary CVAP imbalance is eliminated, however, there may be circumstances in which the gross malapportionment of eligible voters is unavoidable. In those instances, the one person, one vote requirement should forbid the use of single-member districts.

ARGUMENT

I. The One Person, One Vote Requirement Must Provide Some Protection to Electoral Equality

The one person, one vote requirement has a "long and prestigious pedigree."[14] First recognized in *Gray v. Sanders*, 372 U.S. 368 (1963), the requirement has always protected "the right to have the vote counted at full value without dilution or discount." *Reynolds v. Sims*, 377 U.S. 533, 555 n.29 (1964) (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

However, the meaning of this protection has remained unclear. This Court held in *Reynolds* that state electoral districts "must be apportioned on a population basis,"[15] but two years later noted in *Burns v. Richardson* that "[a]lthough total population figures were in fact the basis of comparison in [*Reynolds*] and most of the others decided that day, our discussion carefully left open the question of what population was being referred to."[16] To this day, that question is still open, which is understandable given that "in almost all cases th[is] Court was dealing with situations in which total population was

---

[14] Kent D. Krabill & Jeremy A. Fielding, *No More Weighting: One Person, One Vote Means One Person, One Vote*, 16 TEX. REV. L. & POL. 275, 278 (2012).

[15] 377 U.S. at 568.

[16] 384 U.S. 73, 91 (1966).

presumptively an acceptable proxy for potentially eligible voters."[17]

That proxy relationship does not hold true, however, in areas such as Yakima that have experienced the relatively recent phenomenon of "large influx[es] of concentrated illegal immigration,"[18] or in other jurisdictions with significant populations of disenfranchised felons.[19] The Courts of Appeals for the Fourth, Fifth, and Ninth Circuits have all attempted to clarify the one person, one vote requirement in areas with substantial numbers of ineligible voters. In 1990, the Ninth Circuit defined the one person, one vote requirement in favor of representational equality, holding that the "apportionment for state legislatures *must* be made upon the basis of population."[20] In 1996 and 2000, respectively, the Fourth and Fifth Circuits held that local jurisdictions are allowed to choose their own apportionment basis.[21]

Garza, *Daly*, and *Chen* do not afford any protection to electoral equality. Under those decisions, jurisdictions are free to ignore any CVAP imbalance among their districts (indeed, *Garza* requires states

---

[17] *Chen*, 206 F.3d at 525.

[18] Krabill & Fielding, *No More Weighting*, *supra*, at 282.

[19] *See, e.g.*, *Davidson v. City of Cranston*, 42 F. Supp. 3d 325 (D.R.I. 2014).

[20] *Garza*, 918 F.2d at 774.

[21] *Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996); *Chen*, 206 F.3d at 528.

and localities to ignore any imbalance). The Fourth, Fifth, and Ninth Circuits all permit a jurisdiction to draft a redistricting plan in which eligible voters are severely malapportioned. As Appellants have explained, existing precedent would have allowed the Texas Legislature to apportion its districts based on total population, even if 30 of the 31 districts contained only one voter and the 31st district contained every other voter in the state. Br. of Appellants 36-37.

The one person, one vote rule cannot permit such absurd results. The Constitution must afford some protection to electoral equality, and this Court's jurisprudence supports that conclusion. In *Gray*, this Court announced that "*all who participate* in the election are to have an equal vote" and that the "concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who *meet the basic qualifications*." 372 U.S. at 379-80 (emphasis added). And in *Reynolds*, this Court explained that giving the votes of some citizens "two times, or five times, or 10 times the weight of votes" of other citizens would be no more constitutional than allowing some voters to "vote two, five, or 10 times" or "multipl[ying]" some votes by "two, five, or 10." 377 U.S. at 562.

Critically, *Reynolds* discusses the weighting of votes relative to other votes, and not relative to overall population. *Id.* at 579 ("The overriding objective must be substantial equality of population among the various districts, *so that* the vote of any citizen is

approximately equal in weight to that of any other citizen in the State.") (emphasis added). If this Court intended for the one person, one vote requirement to require equalizing total population among districts, then this Court would have spoken about the harm of allowing a voter to cast a ballot *on behalf of* more people than a voter in another district. Instead, this Court was concerned with allowing some voters to effectively vote more than once. This circumstance arises when some districts have more voters than others, not when districts have greater total populations than others.

Burns does not change the conclusion that the one person, one vote requirement protects electoral equality. In that case, Hawaii used registered voters to apportion its legislative districts. This Court approved of this apportionment basis, explaining that "[t]he decision to include or exclude" certain groups from an apportionment basis "involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere." 384 U.S. at 92. However, this Court added a caveat: The jurisdiction's choice of apportionment basis is allowed "unless a choice is one the Constitution forbids." *Id.*

Burns did not specifically state what the constitution prohibited, but it rejected the proposition that Hawaii's apportionment basis was unconstitutional because it did not "approximate total population distribution." *Id.* at 94. This Court held instead that Hawaii's apportionment basis was constitutional

because it "appears that the distribution of registered voters approximates distribution of state citizens or another permissible population basis." *Id.* Under *Burns*, the one person, one vote requirement tolerates the malapportionment of total population among districts, provided that the apportionment basis at least "approximates distribution of state citizens." *Id.*

Gray, *Reynolds*, *Burns*, and their progeny evince a clear intent to protect electoral equality. This, then, should be the starting point of this Court's decision in this case: The one person, one vote requirement affords at least some protection to electoral equality. Consequently, *Daly*, *Chen*, and *Garza* must be overruled because they allow (and, in the case of *Garza*, require) states and localities to apportion based on total population without requiring any consideration of electoral equality. Although a jurisdiction in the Fourth Circuit or Fifth Circuit could theoretically choose to apportion based on CVAP under existing law, *Daly* and *Chen* must still be overruled because they allow total-population apportionment without any regard to CVAP imbalances.

Even if this Court is not inclined to require districts to be apportioned by CVAP, this Court should at least hold that the one person, one vote requirement did not intend to allow local jurisdictions to ignore the allocation of CVAP altogether.

II. This Court Should Protect Electoral Equality by Requiring Drafters of Redistricting Plans to Avoid Unnecessary CVAP Imbalance, Which is Feasible with Available Demographic Data

Yakima concurs with Appellants and Judge Kozinski that "what lies at the core of one person one vote is the principle of electoral equality, not that of equality of representation," and therefore districts should be apportioned based on CVAP. *Garza*, 918 F.2d at 782. However, this Court may hesitate to mandate a new apportionment basis for states and localities. If this Court is inclined to affirm the practice of apportioning based on total population, then this Court should still protect electoral equality by requiring drafters of redistricting plans to avoid unnecessary CVAP imbalance. Alternatively, if this Court intends to allow local jurisdictions to choose their own apportionment basis, then this Court should still mandate that a plan apportioned with total population must still avoid unnecessary CVAP imbalance.[22]

Imposing this requirement will allow jurisdictions to continue apportioning based on total

---

[22] Because the one person, one vote requirement is a constitutional mandate, eliminating unnecessary CVAP imbalance would be compelled in all redistricting contexts, including regular reapportionments following the publication of the federal decennial Census or the drafting of redistricting plans during the liability and remedy phases of Section 2 litigation.

population but will prevent them from neglecting electoral inequality, which occurred in both this case and in the lawsuit against Yakima. In each matter, no attempt was made to eliminate the gross CVAP disparities in the redistricting plans that were eventually adopted. In this case, Appellants' expert demographer submitted a declaration establishing that there were many feasible ways to draw the Texas Senate districts with approximately equal total populations but without gross deviations in CVAP. In the Yakima litigation, the plaintiffs' demographer conceded in his deposition that he made no attempt to reduce the CVAP imbalance in the redistricting plans that the plaintiffs relied on in the liability and remedy phases. In both this case and *Montes*, electoral equality was a potentially avoidable casualty of the redistricting process.

Drafters of redistricting plans can easily optimize a plan to prevent unnecessary collateral damage. For example, drafters already avoid unnecessarily splitting existing voting precincts.[23] Moreover, mandating the elimination of unnecessary CVAP imbalance is a workable requirement given the available demographic data. "The sole source of citizenship data published by the Census Bureau is the ACS, an annual nationwide sample survey that collects demographic

---

[23] *See, e.g.*, *Large v. Fremont Cty.*, 709 F. Supp. 2d 1176, 1191 (D. Wyo. 2010) ("The plans were drawing using, to the extent possible, borders of existing precinct boundary lines, and Mr. Cooper testified that they complied with traditional redistricting criteria.").

information, including age, race, ethnicity, and citizenship. With this data, demographers can estimate the CVAP of states, counties, cities, census tracts, and block groups. The Census Bureau combines CVAP data over five year periods to provide reliable estimates for small areas, such as census tracts and block groups."[24]

Appellees and some *amici* may argue that CVAP data is not sufficiently precise to use as an apportionment basis. Even if persuaded by this argument, this Court should not ignore electoral equality altogether. CVAP data, and associated margins of error, can be used to determine whether unnecessarily extreme variance exists among the eligible voter populations in districts. CVAP data provide "point estimates"[25] of the population of eligible voters in each district, along with margins of error. The point estimate for a district can be compared to that of any other district. The CVAP of an entire jurisdiction is readily available through the ACS data, which provides the ideal CVAP

---

[24] *Cisneros v. Pasadena Indep. Sch. Dist.*, No. 4:12-CV-2579, 2014 U.S. Dist. LEXIS 58278, at *12 (S.D. Tex. April 25, 2014) (citing U.S. CENSUS BUREAU, A COMPASS FOR UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT GENERAL DATA USERS NEED TO KNOW (Oct. 2008), *available at* http://www.census.gov/acs/www/Downloads/handbooks/ACSGeneralHandbook.pdf).

[25] "The point estimate is the most likely value given by the data and methodology but, as an estimate, it is subject to a margin of error." *Fabela v. City of Farmers Branch*, No. 3:10-CV-1425-D, 2012 U.S. Dist. LEXIS 108086, at *18 (N.D. Tex. Aug. 2, 2012).

of a district (*e.g.*, total CVAP divided by the number of districts). Though these numbers have known margins of error, demographers can calculate the maximum CVAP deviation by identifying the two districts with the greatest negative and positive deviations, respectively, from the ideal CVAP, and the margin of error associated with that deviation. Accordingly, ACS data enable demographers to compare the maximum CVAP deviation among multiple redistricting plans.

To illustrate, assume a local jurisdiction has an overall CVAP of 5,000, and that the margin of error for the overall CVAP estimation is plus-or-minus 250. If this jurisdiction is divided into five districts, then the ideal CVAP for each district is 1,000. Assume that two different redistricting plans are proposed. The first has five districts of roughly equal total population and CVAP. The second has five districts of roughly equal total population, but one district has a CVAP of 1,400, while the other four districts have a CVAP of 900. Although the CVAP estimates for each district in both plans are subject to margins of error, the first plan demonstrably avoided CVAP imbalance, while the second plan did not.

As set forth above in this brief, as well as skillfully argued in the briefs of Appellants and *amici* in support of Appellants, the one person, one vote requirement was never intended to permit the complete disregard of electoral equality. Yet most states and localities subscribe to representational equality by apportioning based on total population. This Court can reconcile the two principles of equality by requiring

drafters of any redistricting plan apportioned based on total population to avoid unnecessarily extreme CVAP imbalance.

III. The One Person, One Vote Requirement Forbids the Use of Single-Member Districts in Jurisdictions Where Intolerably High CVAP Variance Cannot Be Avoided

Even after eliminating unnecessarily extreme CVAP imbalance, a state or locality that apportions based on total population may find itself with an unavoidably high degree of CVAP variance. For example, a jurisdiction may consider voluntarily switching to a single-member district plan. The drafter could approximately equalize total population, eliminate unnecessary CVAP imbalance, and adhere to other traditional redistricting criteria, and yet still be confronted with grossly malapportioned eligible voter populations. The same problem could occur when a state or locality apportions its districts based on total population following the publication of the decennial Census: Even if the drafters eliminate all *unnecessary* CVAP imbalance, their plan may still contain *unavoidable* CVAP imbalance of an extreme degree.

Or a jurisdiction may encounter a situation like Yakima, where the plaintiffs suing the jurisdiction under Section 2 cannot satisfy their burden in the liability phase without proposing a single-member district plan that grossly malapportions eligible voter populations among the districts for some other

purpose. In that instance, dividing a jurisdiction into single-member districts would necessarily cause extreme electoral inequality.

The one person, one vote requirement does not meaningfully protect electoral equality unless the use of single-member districts is prohibited in the situations described above. While requiring drafters to eliminate unnecessarily extreme CVAP imbalance provides some protection to electoral equality, that protection does not disappear once avoidable disparities have been removed. If the use of single-member districts would inevitably lead to the gross malapportionment of CVAP among districts, then single-member districts cannot be used in that jurisdiction. To hold otherwise would ignore the "fundamental idea[ ] of democratic government"[26] that "[t]he overriding objective [of redistricting] must be substantial equality of population among the various districts, *so that* the vote of any citizen is approximately equal in weight to that of any other citizen of the State."[27]

The argument that electoral equality should give way to some other objective (such as remedying alleged vote dilution under Section 2) cannot be reconciled with the hierarchy of legal authority. The right of "all who participate in the election . . . to have an equal vote . . . is required by the Equal Protection Clause of the Fourteenth Amendment." *Reynolds*, 377

---

[26] *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

[27] *Reynolds*, 377 U.S. at 579 (emphasis added).

U.S. at 557-58. Section 2, in contrast, is a "*statutory* prohibition of all voting rights discrimination."[28] Though the interest in remedying vote dilution is undoubtedly legitimate, "everything must give way" to the "superior provisions of the constitution of the United States." *In re Walsh*, 104 F. at 520.

Further, even assuming that remedying a Section 2 violation is a compelling state interest,[29] this goal would not justify the use of single-member districts when doing so would create unavoidable extreme CVAP imbalance. Using race as the predominant factor in drawing district lines may survive strict scrutiny if it does not subordinate traditional race-neutral redistricting criteria to race any more than is "reasonably necessary" to avoid liability under Section 2.[30] However, this Court recently clarified that the one person, one vote rule is "not a factor to be treated like other nonracial factors when a court determines whether race predominated over other, 'traditional' factors in the drawing of district boundaries."[31] Instead, it is "part of the redistricting background" and "taken as a given."[32] Accordingly, a compelling

---

[28] S. REP. NO. 94-417, at 30 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 207 (emphasis added).

[29] *See Bush v. Vera*, 517 U.S. 952, 976 (1996).

[30] *Id.* at 978-79.

[31] *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1270 (2015).

[32] *Id.*

state interest cannot justify the gross malapportionment of CVAP.

In *Mahan v. Howell*, this Court stated that a maximum total population deviation of 16.4% "may well approach tolerable limits."[33] And in *Chapman v. Meier*, this Court struck down a plan with a deviation of 20.14% as constitutionally impermissible.[34] The plan adopted by the Eastern District of Washington had a maximum CVAP deviation of 63.98%, more than *three times* the deviations in *Mahan* and *Chapman*. With Yakima's demographics, it is unlikely that a single-member district plan can be created without causing intolerable levels of electoral inequality. Thus, imposing single-member districts in Yakima and comparable jurisdictions would necessarily cause a violation of the one person, one vote rule. As such, an alternative voting system must be adopted instead.[35]

---

[33] 410 U.S. 315, 329 (1973).

[34] 420 U.S. 1, 21-26 (1975).

[35] At-large election systems are not all created equal. The system used in Yakima was "winner-takes-all" with a top-two primary, meaning that voters could select from only two candidates at the general election and the candidate with a simple majority of the voters was elected. Modified at-large elections, such as cumulative and limited voting can "cleanse[ ]" at-large systems of their "dilutive effects." Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 St. Louis U. Public L. Rev. 97, 98 (2010). Moreover, "[n]othing in [this Court's] present understanding of the Voting Rights Act places a principled limit on the authority of federal

(Continued on following page)

Single-member district plans have been and will continue to be imposed without regard to the severe malapportionment of eligible voters. That cannot continue in light of "current conditions," which Yakima and this case exemplify. *Shelby Cnty.*, 133 S. Ct. at 2629.

CONCLUSION

This Court should hold that this case presents a justiciable question, and that the one person, one vote requirement requires districts to be apportioned based on CVAP. The judgement entered against Appellants below in this case should therefore be reversed. Alternatively, this Court should reverse the judgment below with instructions that any redistricting plan apportioned based on total population must avoid all unnecessarily extreme CVAP imbalance, and that single-member districts are prohibited if gross CVAP deviations are inevitable.

---

courts that would prevent them from instituting a system of cumulative voting as a remedy under Section 2." *Holder v. Hall*, 512 U.S. 874, 897-99 (1994) (Thomas, J., concurring in the judgment); *see also Branch v. Smith*, 538 U.S. 254, 309-10 (2003) (O'Connor, J., concurring).

Respectfully submitted this 7th day of August, 2015.

FRANCIS S. FLOYD
Counsel of Record
JOHN A. SAFARLI
FLOYD, PFLUEGER & RINGER, P.S.
200 W. Thomas St., Ste. 500
Seattle, WA 98119
(206) 441-4455
ffloyd@floyd-ringer.com